273 PLAINTIFF'S EXHIBIT 6.

Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

GENTLEMEN: You will please take notice that on the trial of this action I shall move the court for leave to amend the complaint herein, so that the sub-division thereof marked "IV" shall read as follows:

"IV. That on or about the third (3rd) day of March, 1909, Stephen Mistschook was travelling in a vehicle drawn by two horses along the said public highway known as the Haverstraw Road and when he reached the place where said railroad crosses said highway near the said Sloatsburg station he attempted with due care and caution and without any negligence on his part, to drive over the defendant's tracks, and while so proceeding, the defendant carelessly and negligently, in the operation of its said railroad, caused one of its locomotives with a train of cars attached thereto to approach said crossing and then and there pass rapidly over the track of
274 said railroad, and negligently and carelessly omitted to give any warning thereof or to give any signal by ringing the bell or sounding the whistle of said locomotive and carelessly and negligently failed to maintain gates or any barrier at said crossing or to have a flagman at said place and allowed the signal bell which customarily was rung when trains came in dangerous proximity to said crossing, to be removed or get out of order so that it failed to ring, or rang continuously, and by reason thereof the said Stephen Mistschook was unaware of the approach of said locomotive and train of cars, and he and the horses he was driving were killed and the vehicle was broken by being struck by the said locomotive and thrown a great distance."

Dated, New York, December 29, 1913.

Yours, etc.,

CHARLES C. SANDERS,
Attorney for Plaintiff.

Office & P. O. Address, 206 Broadway, Borough of Manhattan, New York City.

To Messrs. Stetson, Jennings & Russell, Attorneys for Defendant.

(Here follow photographs marked pp. 275 to 280, inclusive, and diagram marked page 281.)

282 DEFENDANT'S EXHIBIT H.

No. 2865.

United States of America.

Department of State.

To All to Whom these Presents Shall Come, Greeting:

I certify that the documents hereto annexed are true copies from the files and records of this Department.

In Testimony Whereof, I, W. J. Bryan, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this sixth day of January, 1914.

W. J. BRYAN,
Secretary of State.
By BEN G. DAVIS,
Chief Clerk.

(Seal of Department of State. United States of America.)

Copy.

Serial No. 133. May 8, 1909.

Excellency:

Referring to the Department's note of the first instant. I have the honor to inform you that temporary recognition has been accorded Pierre Adamovitch as Vice Consul of your Government at New York City.

Accept, Excellency, the renewed assurances of my highest consideration.

P. C. KNOX.

His Excellency, Baron Rosen, Ambassador of Russia.

283 Copy.

Ambassade Imperiale de Russie,

Washington, D. C.

N 212. LE 27 AVRIL, 1910.

Monsieur le Secretaire d'Etat:

M. Adamovitch, Vice-Consul de Russie a New York, vient d'etre transfere en la meme qualite a Berlin, et M. M. Ragozine a ete nomme pour remplacer M. Adamovitch.

En Portant ce qui precede a la connaissance de Votre Excellence,

je saisis cette occasion pour Lui renouveler les assurances de ma plus haute consideration.

ROSEN.

Son Excellence, Monsieur Philander C. Knox, Secretary d'Etat, etc., etc.

DEFENDANT'S EXHIBIT I.

Erie Railroad Company to Irene Miszuk, Adm'r, etc., of the Estate of Steve Miszuk, Deceased, or The Russian Imperial Consul General, Care Claim Agent, Dr.

25857.

When the receipt herein is dated and signed as required this voucher is payable at any time within thirty days from Sep.
284 28, 1909, at the Commercial Trust Company of New Jersey, Jersey City or United States Mortgage & Trust Co., New York.

(S'g'd) W. B. BANICKER,
Ass't Treasurer.

For and in full settlement of all claims and demands against the company for the death of Steve Miszuk, at or near Sloatsburg, N. Y., on or about March 3rd, 1909. $400.00

(Stamped on front:) Paid Treasurer, Erie R. R. Co., Oct. 9, 1909, Paying Teller. Paid Oct. 8, 1909, United States Mortgage & Trust Company.

I Certify that the above account has been duly authorized and approved by the proper officers, that the same has been examined by me and found correct and has been registered and filed in this office.

(S'g'd) J. G. LIVENGOOD,
Auditor of Disbursements.

Approved for Payment.

(S'g'd) M. P. BLAUVELT,
Comptroller.

Received October 6, 1909, of Erie Railroad Company, Four hundred & No/100 dollars in full of the above account.

IMPERIAL RUSSIAN CONSUL GENERAL,
NEW YORK,
By P. D'ADAMOWITSCH,
Vice Consul.

(Seal of Consulate General of Russia at New York.)

(Endorsed as follows:) Erie Railroad Company. Voucher No. 833, Registered in office of Auditor of Disbursements in the month of Sept., 1909. Paid Oct. 8, 1909, First Nat'l Bank, New York. Pay to the order of First National Bank of New York, Agency of Russo-Chinese Bank.

285 DEFENDANT'S EXHIBIT J.

Release.

Know All Men by These Presents, That I, Irene Miszuk, as wife, and Admx. of the Estate of Steve Miszuk, by Baron A. Schoppenbach, the Imperial Russian Consul in sole consideration of the sum of Four hundred and 00/100 dollars, to me in hand paid by the Erie Railroad Company, do hereby for myself, my heirs, my executors, administrators and assigns, release and forever discharge said Erie Railroad Company, and all other lines or companies leased, operated or controlled by or allied with it, and each of them, together with their and each of their successors and assigns, from all debts, claims and demands whatsoever, including such as have arisen by reason of, or in any manner grow out of the death of Steve Miszuk at or near Sloatsburg, New York, on or about March 3, 1909.

In Witness Whereof, I have hereunto set my hand and seal the 6th day of October in the year one thousand nine hundred & nine.

IMPERIAL RUSSIAN CONSUL-GENERAL.
NEW YORK. [L. S.]
By P. D'ADAMOVITSCH,
Vice Consul.

Signed, sealed and delivered in presence of
THOMAS K. TRENCHARD.

(Seal of Consulate General of Russia at New York.)

286 STATE OF NEW YORK,
County of New York, ss:

On this 6th day of October, in the year one thousand nine hundred & nine, before me, the subscriber, personally came Baron A. Schlippenbach, to me known to be the individual who is described in and who executed the foregoing release, and acknowledged that he executed the same for the purposes therein mentioned.

(S'g'd) T. K. TRENCHARD,
Comm'r of Deeds, City of N. Y.

STATE OF NEW YORK,
County of New York, ss:

Baron A. Schloffenbach, being duly sworn, deposes and says that he is the person named in and who executed the foregoing release; that before executing the same, the said release was read by him; that

he knows the contents thereof and fully understands that by signing said Release he discharges and releases the Erie Railroad Company, and all other lines or companies leased, operated or controlled by or allied with it, and each of them, together with their and each of their successors and assigns, from all claims and demands which he has against it or them on account of the matters therein set forth.

IMPERIAL RUSSIAN CONSUL-GENERAL,
NEW YORK,
P. D'ADAMOVITCH, *Vice Consul.*

Sworn to before me this 6 day of Octo., 1909.

THOMAS K. TRENCHARD,
Com. of Deeds, City of N. Y.

(Seal of Consulate General of Russia at New York.)

287 DEFENDANT'S EXHIBIT K FOR IDENTIFICATION.

Translation.

Handed by:

1911, November 5th. I, the undersigned, peasant woman of the village Ozero, of Trostianzy volost, district of Lutzk, wife of the killed in America Stepan Gerasimov Mestschuk, Irina Zinovieve Mestschuk, give this receipt to the Trostianzy Volost Board to the effect that the deposit in the sum of seven hundred and seventy roubles (770 rbls. 80 kop.), sent as compensation for my husband, who was killed in America, was received by me, and this I acknowledge by my signature. Peasant woman of v. Ozero, Irina Mestschuk, and for her, who is illiterate, and at her personal request, signed peasant of v. Trostianzy Daniil Olchovitsch.
Trostionzy Volost Elder: (sig. P. GUZIYK.)

(Seal of Trostianzy Volost Elder.)

244.

The Imperial Russian Consulate General at New York herewith certifies the correctness of the English translation from the Russian Document hereto attached.
New York, January 12/25, 1912.

CONSUL GENERAL,
By Y. LAVOROFF,
Vice-Consul.

(Seal of Consulate General of Russia at New York.)
3 roubl.
(Document in Russian attached.)

288 DEFENDANT'S EXHIBIT L FOR IDENTIFICATION.

Translation.

Ministry of the Interior.

Governor of Volynia.

Provincial Board.

Section III, Table I.

29th November, 1911.

No. 6268.

City of Jitomir.

To the Imperial Russian Consulate General in New York:

I have the honor to forward the receipt of the widow of peasant Stepan Mestschuk, who died in America, Irina Mestschuk, dated 5th November of this year, for 770 roubles, 80 kopeks, sent with the letter of 8/25 September, 1909, sub No. 2770.

Governor, Chamberlain of the Court of His Imperial Majesty:
(Sig. P. A. KUTAISOFF.)

Vice-Governor: (Sig. MELNIKOFF.)
Councillor: (sig. illegible.)
Chief Secretary: (sig. illegible.)

243.

The Imperial Russian Consulate General at New York herewith certifies the correctness of the English translation from the Russian Document hereto attached.

New York, January 12/25, 1912.

CONSUL GENERAL,
By Y. LAVOROFF,
Vice-Consul.

(Seal of Consulate General of Russia at New York.)
3 roubls.
(Document in Russian attached.)

289 DEFENDANT'S EXHIBIT M.

Erie Railroad Company,

PATERSON, N. J., Oct. 6, 1909.

Mr. P. Donnelly, Agent, Sloatsburgh, N. Y.

DEAR SIR: There has been sent to you four signs reading Bell Out of Order, for use on the bells on the crossings west of your station, when they are out of order. Please advise if you have received them.

Yours truly,

CHAS. PFITZNER,
Supr. Crossings.

(Pencil memo as follows:)
Yes sir, they are here.
(Sgd.) P. J. DONNELLY, *Ag't.*

10/7/09.

The foregoing case contains all the evidence and testimony offered and given upon the trial of this action.

Stipulation Settling Case.

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action and that the same be settled and ordered to be filed and annexed to the judgment roll herein.

Dated, New York, July 31, 1914.

CHARLES C. SANDERS,
Attorney for Plaintiff-Respondent.
STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant-Appellant.

290 *Order Settling Case.*

On the above stipulation, the foregoing case on appeal containing all the evidence is hereby settled and ordered on file.

Dated, New York, Sept. 28, 1914.

EDWARD J. GAVEGAN, *J. S. C.*

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the judgment roll and the case and exceptions, as settled, and the whole thereof, now on file in the office

of the Clerk of the County of New York, and certification thereof by the Clerk of said county, pursuant to Section 1353, is hereby waived.

Dated, New York, July 31, 1914.

CHARLES C. SANDERS,
Attorney for Plaintiff-Respondent.
STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant-Appellant.

Opinion by Mr. Justice Gavegan.

HAMILTON

v.

ERIE R. R.

Motion to set aside a verdict for plaintiff. The verdict was directed by the Court upon motion of both parties at the close of the whole case. The plaintiff is County Treasurer of Rockland County, and sues as public administrator of the goods, chattels and credits
291 of one Stephen Mistschook, who was killed by one of defendant's trains at Haverstraw Road Crossing, in said county. It is claimed by defendant that the deceased was a subject of the Czar of Russia. He left no surviving widow and next of kin in this country. After the accident which resulted in decedent's death the defendant entered into negotiations with P. d'Adamovitch, the duly accredited and recognized Vice-Consul of Russia in this State. As a result of these negotiations the defendant paid to the said P. d'Adamovitch the sum of $400 in full settlement of any claim for damages for decedent's death, and at the same time took said d'Adamovitch's general release, which purported to be made in behalf of decedent's widow and next of kin, who are subjects of the Czar of Russia, residing in the Village of Ozero, Province of Volhynia. Article VIII of the treaty between the United States and Russia, in force at the time of the alleged settlement of the claim, provided: "The two contracting parties shall have the liberty of having in their respective ports consuls, agents and commissaries of their own appointment, who shall enjoy the same privileges and powers as those of the most favored nations." The "most favored nation" clause of the treaty, so far as relates to the question here presented, is found in Article IX of the treaty between the United States and the Argentine Republic, which provides: "If any citizen of either of the high contracting parties shall die without will or testament in any of the territories of the other, the consul-general, or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Relying on the reading and interpretation of the language of the fore-

going, defendant contends that the Russian Vice-Consul,
292 d'Adamovitch, had the exclusive right to adjust the claim for damages for the death of the decedent, and that therefore his release is binding and a bar to a recovery in this action. The question as to whether a foreign consul has a prior and exclusive right, in the absence of a widow, next of kin or creditor, to letters of administration on the estate of a deceased foreign subject here has been passed upon in this county by the late Surrogate Thomas (in re Legiorato's Estate, 69 N. Y. Supp., 507). The decedent in that case was a subject of the King of Italy and died in this country intestate, leaving no relatives here. The Italian Consul here, pursuant to the treaty with the "most favored nation," applied for letters of administration. The surrogate at page 509 said: "It will be observed that the right assured to the consul-general is to 'intervene,' and this intervention is to be 'conformably with the laws of the country.' To intervene is to 'come between' (Webster's Dictionary), and the right to intervene in a judicial proceeding is the right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire corpus of a fund which is the subject of the proceeding. A right to intervene 'conformably with the laws' of the State of New York is something different from the right to set aside the laws of the State and take from a person who by those laws is the officer intrusted with the administration of estates of persons domiciled here and who leave no next of kin within the jurisdiction the right and duty of administering their estates. And when the laws of the State require an administrator to give bond, to be measured by the value of the assets, nothing in the treaty provision grants to the consul immunity from this requirement to be obtained merely by asserting in substance that he has no knowledge of the existence of any debt. The eminent text writers cited in the opinion
293 of the learned Surrogate Silkman do not intimate that the courts of civilized states, acting under general laws passed for the protection of foreigners equally with their own citizens, must grant administration, contrary to the terms of those laws, to consuls under any circumstances whatever. * * * Consuls may accept administration, but no right to override local law is suggested." The reasoning in this opinion has been followed by the United States Supreme Court in the case of Bocca v. Thompson (223 U. S., 317), in which Mr. Justice Day, writing the opinion of the court, at page 334 said: "Our conclusion, then, is that if it should be conceded for this purpose that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the Consuls of the Italian Government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws upon the estates of deceased citizens of a foreign country and to commit the same to the consuls of such foreign nations, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of the decease." This case also distinguishes and overrules In re Fattosini's Estate (67 N.

Y. Supp., 1119), In re Labrasciano's Estate (77 N. Y. Supp., 1040), and In re Scutella's Estate (129 N. Y. Supp., 20). I reach the conclusion that the purported settlement with and release of all claims in behalf of the decedent's widow and next of kin was of no binding effect on either this plaintiff or them. Both sides having moved for a direction of a verdict, conceded that there was no dispute in the facts, that there was only a question of law to be passed upon, and that is arose upon a settled and uncontradicted state of facts
294 (Legget v. Hyde, 58 N. Y., 272, 275). I consider that there is sufficient evidence in the case to support the verdict directed for the plaintiff (see Pruey v. N. Y. C. & H. R. R. R., 41 A. D., 158; aff'd 166 N. Y., 616). Motion denied. Defendant may have thirty days' stay and sixty days to make a case.

Order Filing Record in Appellate Division.

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, in the First Judicial Department.

Dated, New York, Sept. 28, 1914.

EDWARD J. GAVEGAN, *J. S. C.*

295 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 25th day of June, 1915.

Present: Hon. George L. Ingraham, Presiding Justice.
" Chester B. McLaughlin,
" Frank C. Laughlin,
" Victor J. Dowling,
" Henry D. Hotchkiss,
Justices.

7521.

WALTER G. HAMILTON, County Treasurer, etc., Respt.,

vs.

ERIE RAILROAD COMPANY, Applt.

Order of Affirmance on Appeal from Judgment Entered on Verdict of a Jury.

An appeal having been taken to this court by the defendant from the judgment of the Supreme Court entered on the 27th day of

March, 1914, and from an order made by said Court denying a motion for a new trial, entered on the 28th day of March, 1914, and for an order of said Court entered on the 21st day of April, 1914, and said appeal having been argued by Mr. William C. Cannon, of counsel for the appellant, and by Mr. Herbert C. Smyth, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously ordered and adjudged that the judgment and order so appealed from be and the same are hereby, in all things, affirmed; and the the respondent recover of the appellant the cost of this appeal.

Enter,

G. L. I.

296 *Judgment of Affirmance.*

Supreme Court, New York County.

County Clerk's Index No. 24,675/11.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattles and Credits of Stephen Mistschook, Deceased, Plaintiff-Resp.,

against

ERIE RAILROAD COMPANY, Defendant-Applt.

The above-named defendant, Erie Railroad Company, having appealed to the Appellate Division of the Supreme Court, for the First Department, from the judgment entered herein in the office of the Clerk of the County of New York on the 27th day of March, 1914, in favor of the plaintiff above-named and against the defendant for the sum of Eight thousand sixty-six and 86/100 ($8,066.86) Dollars, and from the order denying the defendant's motion to set aside the verdict and for a new trial, entered in the office of the Clerk of New York County on the 28th day of March, 1914, and from an order of said Court denying the defendant's motion to dismiss the complaint entered on the 21st day of April, 1914, and the said appeal having been duly argued, and the said Appellate Division having, by an order dated the 25th day of June, 1915, and entered on the said 25th day of June, 1915, affirmed the judgment and orders so appealed from in all things with
297 costs, and the costs having been duly adjusted by the Clerk at the sum of $99.65, upon motion of Charles C. Sanders, attorney for the plaintiff-respondent, it is unanimously

Ordered and adjudged that the judgment and orders so appealed from be, and the same hereby are in all things affirmed, and that the plaintiff-respondent, Walter G. Hamilton, County Treasurer of the County of Rockland, as public administrator of the goods, chattels and credits of Stephen Mistschook, deceased, recover of

the defendant-appellant, Erie Railroad Company, the sum of $99.65, his costs as taxed.

Dated, New York, June 30, 1915.

WM. F. SCHNEIDER, *Clerk.*

Order Granting Leave to Appeal to Court of Appeals.

Court of Appeals of the State of New York.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Deceased, Plaintiff-Respondent,

against

ERIE RAILROAD COMPANY, Defendant-Appellant.

Defendant having moved before me for leave to appeal to the Court of Appeals by notice of motion dated the 23rd day of
298 July, 1915, upon the case on appeal to the Appellate Division, First Judicial Department; and upon the order of the said Appellate Division, unanimously affirming the judgment and orders of the Supreme Court, New York County, made and entered in the office of the Clerk of said Appellate Division on the 25th day of June, 1915; and upon the judgment of affirmance and for the sum of Ninety-nine and 65/100 Dollars ($99.65), entered upon the said order of the Appellate Division in the office of the Clerk of the County of New York on the 30th day of June, 1915; and upon the order of the Appellate Division, First Department, made and entered in the office of the Clerk of said Appellate Division on the 9th day of July, 1915, denying defendant's motion for leave to appeal to the Court of Appeals, or in the alternative for a re-argument of the appeal herein; and upon the affidavit of Rudolph L. von Bernuth, duly verified the 23rd day of July, 1915, and annexed to said notice of motion; and upon the pleadings and proceedings herein; and after hearing Rudolph L. von Bernuth, Esq., of counsel for defendant, in support of said motion, and Herbert C. Smyth, Esq., of counsel for plaintiff, in opposition thereto,

Now, upon motion of Stetson, Jennings & Russell, attorneys for defendant herein, it is

Ordered that the motion of the defendant for leave to appeal to the Court of Appeals be and it hereby is granted, and the defendant be and it hereby is allowed to appeal to the Court of Appeals from the judgment of affirmance and for the sum of ninety-nine and 65/100 dollars ($99.65) costs entered herein in the office of the Clerk of the County of New York on the 30th day of June, 1915.

Dated, Brooklyn, New York, August 12th, 1915.

WILLARD BARTLETT,
Chief Judge of the Court of Appeals.

299 *Notice of Appeal to Court of Appeals.*

Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Please take notice that pursuant to leave given by an order of the Honorable Willard Bartlett, Chief Judge of the Court of Appeals, dated August 12th, 1915, and duly filed in the office of the Clerk of the County of New York on the 12th day of August, 1915, Erie Railroad Company, the defendant herein, hereby appeals to the Court of Appeals of the State of New York from the judgment of affirmance and for the sum of Ninety-nine and 65/100 Dollars ($99.65) costs entered herein in the office of the Clerk of the County of New York on the 30th day of June, 1915, upon an order of affirmance of the Appellate Division of the Supreme Court, First Department, entered and filed in the office of the Clerk of said Appellate Division on the 25th day of June, 1915, which said judgment and order affirmed a judgment herein in favor of the plaintiff and against the defendant for the sum of Six thousand Dollars ($6,000)
300 damages, and the sum of One thousand, eight hundred and twenty-four Dollars ($1,824) interest, and the sum of Two hundred forty-two and 86/100 Dollars ($242.86) costs, making in all the sum of Eight thousand, sixty-six and 86/100 Dollars ($8,066.86), entered in the office of the Clerk of the County of New York on the 27th day of March, 1914; and also affirmed an order denying defendant's motion to set aside the verdict and for a new trial entered herein in the office of the Clerk of the County of New York on the 28th day of March, 1914; and also affirmed an order denying defendant's motion to dismiss the complaint entered herein in the office of the Clerk of the County of New York on the 21st day of April, 1914; and that the defendant appeals from each and every part of said judgment of affirmance.

Dated, New York, August 14, 1915.

Yours, etc.,

STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant.

15 Broad Street, Borough of Manhattan, City of New York.

To Charles C. Sanders, Esq., Attorney for Plaintiff, 206 Broadway, Borough of Manhattan, City of New York.

301 *Affidavit of No Opinion in the Appellate Division.*

STATE OF NEW YORK,
County of New York, ss:

Rudolph L. von Bernuth, being duly sworn, deposes and says that he is an attorney and counsellor at law connected with the attorneys for the defendant-appellant herein; that he is familiar with all the proceedings had in this action; that no opinion was handed down by the Appellate Division of the Supreme Court for the First Department upon the affirmance of the judgment in favor of the plaintiff, and the order of the Trial Court denying defendant's motion for a new trial and to set aside the verdict, and the order of the Trial Court denying defendant's motions to dismiss, made at the end of the plaintiff's case and at the end of the whole case.

RUDOLPH L. VON BERNUTH.

Sworn to before me this 19th day of August, 1915.

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

302 *Stipulation.*

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the notice of appeal to the Appellate Division, of the judgment roll, of the case and exceptions in this action now on file in the office of the Clerk of the County of New York, and also of the order of affirmance of the Appellate Division, the judgment of affirmance, the order of Honorable Willard Bartlett, Chief Justice of the Court of Appeals, granting leave to appeal to the Court of Appeals, and the notice of appeal to the Court of Appeals; and certification thereof by the Clerk of the County of New York is hereby waived.

Dated, New York, August 19, 1915.

CHAS. C. SANDERS,
Attorney for Plaintiff-Respondent.
STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant-Appellant.

303 At a Special Term of the Supreme Court, Part II, Thereof, Held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 6th Day of December, 1916.

Present: Hon. Mitchel L. Erlanger, Justice.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals from the judgment of affirmance entered and filed in the office of the Clerk of the County of New York on the 30th day of June, 1915, whereby it was adjudged that the judgment entered in this action on the 27th day of March, 1914, in favor of the plaintiff and against the defendant for the sum of Eight thousand sixty-six and 86/100 ($8,066.86) dollars, damages and costs be affirmed, and further adjudged that the plaintiff recover of the defendant the sum of Ninety-nine and 65/100 ($99.65) dollars, costs, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be pro-
304 ceeded upon according to law,

Now on reading and filing the remit-it/ur from the Court of Appeals herein, and on motion of Charles C. Sanders, attorney for plaintiff, it is

Ordered that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Enter.

M. L. E., *J. S. C.*

[Endorsed:] Supreme Court, New York County. Walter G. Hamilton, etc., Plaintiff, against Erie Railroad Company, Defendant. Order on Remit-it/ur. Charles C. Sanders, Attorney for Plaintiff, 206 Broadway, New York City.

SIRS: Please take notice that within is a copy of an order this day made and entered herein in the office of the Clerk of this Court.

Dated N. Y., Dec. 6th, 1916.

Yours, &c.

CHAS. C. SANDERS,
Att'y for Pl'ff.

206 Broadway, N. Y. City.

To Messrs. Stetson, Jennings & Russell, Att'ys for Def't, 15 Broad St., N. Y. Cit-.

305 Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistchook, Deceased, Plaintiff-Resp't,

against

ERIE RAILROAD COMPANY, Defendant-App'l't.

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 27th day of March, 1914, for the sum of Eight thousand sixty-six and 86/100 ($8,066.86) dollars; and the defendant having appealed from said judgment to the Appellate Division of this Court for the First Department, and the said judgment having been affirmed in all things by this Court at said Appellate Division, and judgment of affirmance having been rendered thereon the 30th day of June, 1915, and that the plaintiff recover against the defendant Ninety-nine and 65/100 ($99.65) dollars, costs of said appeal; and the defendant having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur, filed herein the — day of December, 1916, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs, and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law; and this Court having by an order duly entered herein the 6th day of December, 1916, ordered that said judgment be made the judg-

306 ment of this Court and the plaintiff's costs having been duly taxed at the sum of One hundred fourteen 70/100 ($114.70) dollars,

Now on motion of Charles C. Sanders, attorney for plaintiff, it is Adjudged that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that the plaintiff recover of the defendant the sum of One hundred fourteen 70/100 ($114.70) dollars, his costs as taxed.

Dated, New York, December 12th, 1916.

WM. F. SCHNEIDER, *Clerk.*

306½ SIR: Take notice that the within is a copy of a judgment this day duly made and entered in the within action in the office of the Clerk of this Court.

Dated, New York, Dec. 12th, 1916.

Yours, &c.,

CHAS. C. SANDERS,
Attorney for Pl'ff,
No. 206 Broadway, New York City.

To Stetson, Jennings & Russell, Esqs., Attorneys for Def't, 15 Broad St.; New York City.

[Endorsed:] County Clerk's Index No. —, Year 191–. Supreme Court, New York County. Walter G. Hamilton, &c., Plaintiff, against Erie Railroad Company, Defendant. Judgment on Remittitur. Charles C. Sanders, Attorney for Pl'ff, No. 206 Broadway, New York City.

307 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court upon a remittitur from the Court of Appeals of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the goods, chattels and credits of Stephen Mistschook, deceased, plaintiff and Erie Railroad Company defendant wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any
308 treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said defendant, Erie Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of January, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 24675–1911. Supreme Court of the United States. October term, 1916. Erie Railroad Company, Plaintiff in Error, vs. Walter G. Hamilton, County Treasurer, etc. Original Writ of Error. Stetson, Jennings & Russell, Solicitors for Plaintiff in Error, 15 Broad St., N. Y. City. Due Service of a Copy of the within Writ of Error is hereby admitted. Dated 16 day of January 1917. Chas. C. Sanders, Att'y for defendant in error. Received Jan. 22, 1917.

309 Supreme Court of the United States.

At Law.

ERIE RAILROAD COMPANY, Plaintiff-in-Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant-in-Error.

Petition for Writ of Error.

The petition of Erie Railroad Company by Stetson, Jennings & Russell, its attorneys, hereby sets forth that on or about the 12th day of December, A. D. 1916, the Supreme Court of the State of New York, made and entered a final order and judgment herein upon the remittitur from the Court of Appeals of the State of New York in favor of Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, the defendant-in-error herein, and against the Erie Railroad Company, the plaintiff-in-error herein, in which final order and judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the Erie Railroad Company, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the State of New York upon the remittitur from the Court of Appeals of the State of New
310 York is the highest court of the said State of New York in which a decision in this suit and this matter could be had.

Wherefore Erie Railroad Company petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of New York for the correction of errors so complained of, and that a transcript of

record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 4th day of January, A. D. 1917.

STETSON, JENNINGS & RUSSELL,
Attorneys for Erie Railroad Company, Plaintiff-in-Error.

Office and P. O. Address, 15 Broad Street, Borough of Manhattan, City of New York, New York.

STATE OF NEW YORK,
County of New York, ss:

David Bosman, being duly sworn, deposes and says that he is an officer of Erie Railroad Company, plaintiff-in-error above named, to wit: the Vice President & Secretary thereof; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

DAVID BOSMAN.

Sworn to before me this 4th day of January, 1917.

[Seal William H. Bruder, Notary Public, Bronx County.]

WM. H. BRUDER,
Notary Public, Bronx County, No. 35.

Certificate filed in New York County, No. 46.

310½ [Endorsed:] Supreme Court of the United States. Erie Railroad Company, Plaintiff-in-Error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, Defendant-in-error. Original. Petition for Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiff-in-error, 15 Broad Street, Borough of Manhattan, City of New York, New York. Due Service of a Copy of the within petition for writ of error is hereby admitted. Dated 16 day of Jan. 1, 1917. Chas. C. Sanders, Att'y for Def't in Error.

311 Supreme Court of the United States.

At Law.

ERIE RAILROAD COMPANY, Plaintiff-in-Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant-in-Error.

Assignment of Errors.

Now comes Erie Railroad Company, plaintiff-in-error, and respectfully submits that in the record, proceedings and final judgment of the Supreme Court of the State of New York upon the remittitur from the Court of Appeals of the State of New York, in a cause wherein Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, is plaintiff and Erie Railroad Company is defendant, there is manifest error in this, to wit:—

First. The said Court erred in holding that the Imperial Russian Consul-General at New York, acting by P. d'Adomovitsch, Vice-Consul, had no authority under the Treaty between the United States of America and His Majesty the Emperor of all the Russias, concluded December 18, 1832, nor under the Treaty between the United States of America and His Catholic Majesty the King of Spain concluded July 3, 1902, both Treaties being in full force and effect during the year 1909, to represent the absent, unknown
312 or minor heirs, next of kin or legal representatives of Stephen Mistschook, deceased.

Second. The said Court erred in holding that the Imperial Russian Consul-General at New York, acting by P. d'Adomovitsch, Vice-Consul, had no authority under the said Treaty between the United States of America and His Majesty the Emperor of all the Russias, concluded December 18, 1832, nor under the Treaty between the United States of America and His Catholic Majesty the King of Spain concluded July 3, 1902, both Treaties being in full force and effect during the year 1909, to compromise, settle, release and discharge the claim or claims, cause or causes of action, in favor of the absent, unknown or minor heirs, next of kin or legal representatives of said Stephen Mistschook, deceased, arising out of or by reason of the death of the said Stephen Mistschook, deceased.

Third. The said Court erred in deciding against the validity of the authority exercised under the United States by said Imperial Russian Consul-General at New York, acting by P. d'Adomovitsch, Vice-Consul.

Fourth. The said Court erred in holding that in the provisions contained in Article VIII of said treaty between the United States

of America and His Majesty the Emperor of all the Russias, and in Article XXVII of the said Treaty between the United States of America and His Catholic Majesty the King of Spain, the said Governments contemplated the assured conservation, administration and settlement of the estates of the citizens of either who died in the country of the other, or dying at sea, left property which was brought into the country of the other.

313 Fifth. The said Court erred in holding that by the said provisions of the said Treaties the said citizens are to be represented only as to the ownership or interest which they may have under the laws of intestacy in the estate of the deceased.

Sixth. The said Court erred in holding that the said provisions of the said Treaty between the United States of America and His Catholic Majesty the King of Spain are ambiguous and that their meaning is uncertain and not clear.

Seventh. The said Court erred in holding that under the said provisions of the said Treaties the existence of an estate of the intestate in the consular district is the ground for the right to represent.

Eighth. The said Court erred in holding that said provisions of the said Treaties denote that the intention of the said Governments was to provide for the safeguarding of the property and the settlement of the estates of the citizens of either dying in the country of the other, or at sea.

Ninth. The said Court erred in holding that the said provisions of the said Treaties have a completed purpose and effect if it be held to authorize the consular officers to act for the absent, unknown or minor heirs, next of kin or legal representatives of their deceased countrymen in relation to the latter's estates in instituting, appearing for and participating in their behalf in legal and other proceedings for the proper administration, conserving and guarding of the estates.

314 Tenth. The said Court erred in holding that the said provisions of the said Treaties did not permit the consular officers to transfer, dispose of, or convert into a different form the property of the absent, unknown or minor heirs or next of kin of the citizens or subjects of their country who shall die within their consular jurisdiction.

Eleventh. The said Court erred in holding that the language of the said provisions of the said Treaties and the rules controlling their interpretation, forbid the construction given thereto by the plaintiff-in-error herein.

Twelfth. The said Court erred in causing judgment to be entered in favor of said Walter G. Hamilton, County, Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, and against said Erie Railroad Company.

Thirteenth. The said Court erred in affirming the said judgment in favor of the said Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, and against said Erie Railroad Company.

Fourteenth. The said Court erred in holding that there was no meritorious exception on the part of said Erie Railroad Company to the rulings of the Trial Justice in admitting or rejecting evidence.

Fifteenth. The said Court erred in not causing judgment to be entered in favor of said Erie Railroad Company and against said Walter G. Hamilton, County Treasurer of the County of
315 Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased.

Wherefore Erie Railroad Company prays that the judgment or decision aforesaid may be reversed and annulled, and for such other and further relief as may be proper and just.

STETSON, JENNINGS & RUSSELL,
Attorneys for Erie Railroad Company, Plaintiff-in-Error.

Office and P. O. Address, 15 Broad Street, Borough of Manhattan, City of New York, New York.

[Endorsed:] Supreme Court of the United States. Erie Railroad Company, Plaintiff-in-Error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, Defendant-in-error. At Law. Original. Assignment of Error. Stetson, Jennings & Russell, Attorneys for Plaintiff-in-error, 15 Broad Street, Borough of Manhattan, City of New York, New York. Due service of a Copy of the within Assignment of Error is hereby admitted. Dated 16 day of Jan., 1917. Chas. C. Sanders, Attorney for Def't in Error.

316 UNITED STATES OF AMERICA, *ss:*

To Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the goods, chattels, and credits of Stephen Mistschook, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Erie Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this eleventh day of January, in the year of our Lord one thousand nine hundred and seventeen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

316½ [Endorsed:] Supreme Court of the U. S. October Term, 1916. Erie Railroad Company, Plaintiff in Error, v. Walter G. Hamilton, County Treasurer, etc., Defendant in Error. Original. Citation. Stetson, Jennings & Russell, No. 15 Broad Street, New York, Solicitors for Plaintiff-in-Error. Due Service of a Copy of the within citation is hereby admitted. Dated 16 day of Jan., 1917. Chas. C. Sanders, Solicitor for Defendant in Error.

317 American Surety Company of New York.

Company's Office Building, 100 Broadway, New York.

Capital $5,000,000.

Supreme Court of the United States.

ERIE RAILROAD COMPANY, Plaintiff in Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant in Error.

Know all men by these presents, that we, Erie Railroad Company, of 50 Church Street, New York City, as Principal and American Surety Company of New York, a corporation, as Surety, are held and firmly bound unto Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, in the full and just sum of ten thousand and 00/100 dollars ($10,000) to be paid to the said Walter G. Hamilton, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30th day of December, in the year of our Lord, one thousand nine hundred and sixteen.

Whereas, the above bounden, Erie Railroad Company is about to petition and pray to the Supreme Court of the United States that a writ of error may be issued in this behalf to the Supreme Court of the State of New York, for the correction of errors complained of, and also that a transcript of record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Now, therefore, the condition of the above obligation is such, that if the petition and prayer of said Erie Railroad Company be granted, and if the said Erie Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its

plea good, then the above obligation to be void; otherwise to be and remain in full force and virtue.

[Seal Erie Railroad Company.]

ERIE RAILROAD COMPANY,
By DAVID BOSMON, *Vice President.*

[Seal American Surety Company of New York.]

AMERICAN SURETY COMPANY
OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice President.

Attest:
LOUIS PAPEN, Esq.,
Resident Assistant Secretary.

318 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of January, 1917, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in the city of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with Louis Papen and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Louis Papen subscribed to the said instrument is in the genuine handwriting of the said Louis Papen and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[Seal William C. Lloyd, Notary Public, Kings County, N. Y.]

W. C. LLOYD,
Notary Public, Kings County.

Ctf. filed in N. Y. Co., N. Y. Co. No. 24; Kings Co. No. 19, Kings Co. Reg. No. 8021; N. Y. Co. Reg. No. 8059; Certificates filed in all counties. Term expires March 30th, 1918.

319 STATE OF NEW YORK,
County of New York, ss:

Wm. H. Bishop, being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York;

that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

WM. H. BISHOP.

Subscribed and sworn before me this 2nd day of Jan., 1917.

[Seal William C. Lloyd, Notary Public, Kings County, N. Y.]

W. C. LLOYD,
Notary Public, Kings County.

Ctf. filed in N. Y. Co., N. Y. Co. No. 24; Kings Co. No. 19, Kings Co. Reg. No. 8021; N. Y. Co. Reg. No. 8059; Certificates filed in all counties. Term expires March 30th, 1918.

Form G 362.
Company's Office Building, 100 Broadway, N. Y.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement, September 30, 1916.

Resources.

Real estate:	
Home Office Building and Land, unencumbered	$3,200,000.00
N. Y. City Water Front, unencumbered	215,000.00
	$3,415,000.00
Appraised value by N. Y. Insurance Dept.	
Stocks and Bonds, Market Value	4,555,551.25
Mortgage and Collateral Loans, Judgments and Decrees	444,100.86

Cash in Banks and Offices		918,563.58	
Premiums in Course of Collection	$861,772.53		
Less amount 3 months or more old	331,751.40		
		530,021.13	
Accrued Interest and Rents		49,748.31	
Salvage Recoverable		148,413.20	
			$10,061,398.33

Liabilities.

Capital Stock	$5,000,000.00	
Surplus and Undivided Profits	1,932,493.39	
Reserve for Unearned Premiums	2,133,519.50	
Reserve for Contingent Claims	777,315.25	
Reserve for Expenses and Taxes	144,242.60	
Reinsurances and Accounts Payable not due	46,971.24	
Premiums Paid in Advance	26,856.35	
		$10,061,398.33

Special Deposits, required by insurance laws of various States, not considered.

320 American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1916, at eleven o'clock a. m.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 7, 1915, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * * * *

Place.	Resident Vice-Presidents.	Resident Assistant Sec's.
New York, N. Y.	Marshall L. Brower	Marshall L. Brower
	A. E. Cotterell	William H. Bishop
	William M. Tomlins, Jr.	A. E. Cotterell
	Lester S. Moore	Charles S. Waterbury
	William H. Bishop	Daniel Stewart
	George R. Crosby	E. D. Sadler
	W. H. E. Reinecke	George R. Crosby
		W. H. E. Reinecke
		E. J. Sabater
		Louis Papen
		Harold R. Ward
		Benjamin A. Willis
		Robert L. Neptune

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 22nd day of January, 1916.

[Seal American Surety Company, New York.]

W. H. RILEY,
Assistant Secretary.

[Endorsed:] Supreme Court of the U. S. Erie Railroad Company, Plaintiff in Error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Defendant in Error. Original. Bond. Stetson, Jennings & Russell, Solicitors for Plaintiff in Error, 15 Broad St., N. Y. City. I approve of the within undertaking both as to form and sufficiency of the surety. Louis D. Brandies, Associate Justice, Supreme Court of the U. S. January 11, 1917.

Due Service of a Copy of the within is hereby admitted.
Dated 16 day of Jan., 1917.

CHAS. C. SANDERS,
Att'y for Def't in Error.

321 Supreme Court of the United States.

At Law.

ERIE RAILROAD COMPANY, Plaintiff in Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant in Error.

Order of Allowance of Writ of Error.

The above entitled matter coming on to be heard upon the petition of the plaintiff-in-error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York, and upon examination of said petition and the record of said matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be and is hereby allowed from this court to the Supreme Court of the State of New York; that the writ of error operate as supersedeas, and that the bond presented by the said petitioner be and the same is hereby approved.

LOUIS D. BRANDIES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. Erie Railroad Company, Plaintiff in error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, Defendant in error. Original. Order of Allowance of Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiff in error, 15 Broad Street, Borough of Manhattan, City of New York, New York. Due Service of a Copy of the within order of allowance of Writ of Error is hereby admitted. Dated 16 day of Jan., 1917. Chas. C. Sanders, Att'y for Def't in Error.

322 WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator, etc., of Stephen Mistschook, Deceased, Respondent,

against

ERIE RAILROAD COMPANY, Appellant.

(Decided November 28, 1916.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1915, affirming a judgment in favor of the plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

William C. Cannon, Frederic B. Jennings, for appellant.

Frederic C. Scofield, Herbert Smyth & Frederic W. Bisgood, for respondent.

COLLIN, *J.*:

The plaintiff seeks to recover, under the statute (Code of Civil Procedure, sections 1902-1905), the damages for a neglect of the defendant through which his intestate was killed while crossing, upon a highway, the tracks of defendant. The entire evidence at its close was submitted to the trial justice through motions for a dismissal of the complaint, the direction of a verdict for the defendant,
323 and the direction of a verdict for the plaintiff. The justice directed a verdict in favor of the plaintiff. The consequent judgment was unanimously affirmed by the Appellate Division. The chief judge of this court granted the defendant leave to appeal to it.

The tracks of the railroad at the highway crossing ran easterly and westerly. The intestate, in a farm wagon drawn by a team of horses which he was driving, stood on the southern side of and about twenty feet from the east-bound or southern track, while a west-bound freight train passed on the west-bound or northern track over the crossing & then drove upon the crossing. The evidence permitted the trial judge to find: The engine of an east-bound passenger train going at

the rate of fifty miles an hour collided with the wagon at five o'clock and forty minutes in the morning of March 3, 1909; the sun had not risen and a mist or fog prevailed; the crossing was unprotected except for an automatic electric signal bell, which was out of order and was ringing and rang continuously; no warning of the approach of the east-bound train was given by the sounding of the bell or whistle of its engine, and the passing freight train made considerable noise. Those findings supported the conclusion that the defendant was negligent.

The view of the intestate toward the west, as he stood waiting for the passing of the freight train, and as he passed on northerly to a point about ten or fifteen feet from the east-bound track, was obstructed; the heads of the horses were twelve or fourteen feet north of the intestate, and the horses were upon the east-bound track at the time the intestate could first have seen the approaching engine; the engine was not less than one hundred and twenty-five feet and not more than two hundred and twenty-five feet from the cross-
324 ing, and was traveling at the rate of about seventy-three feet in a second at the time the intestate could have first seen it or the train. While the evidence in regard to the view of the approaching train practicable to the intestate was in direct contradiction, it supports as facts those statements. Our decision in Parsons v. Syracuse B. & N. Y. R. R. Co. (205 N. Y. 226, 228) is an authority upholding the trial court in finding that the intestate was free from contributory negligence. In that case Judge Hiscock, writing for the court, after stating that the case was submitted to the jury upon two theories, the first of which was, it was the duty of the intestate to "look and listen only in the event that the jury should find from the evidence in this case that it would have availed him had he looked and listened," said: "I think that the evidence justified the court in submitting the case to the jury on the first theory. Taking into account the speed of the engine, the absence of the usual signals either of sound or light, the character of the night and the obstructions to the view, the jury might have found that the exercise of reasonable care by intestate in looking and listening for the approach of a train would not have enabled him to detect the approach of this light engine in time to escape the collision and, therefore, have relieved him from the imputation of contributory negligence."

The appeal presents the more serious question, whether or not there had been a valid settlement and release of the cause of action by the beneficiaries of it, through and by the acts of the Imperial Russian consul-general at New York. On October 6, 1909, the defendant paid the Imperial Russian consul-general, through the vice-consul, four hundred dollars in full settlement of all
325 claims and demands against it for the death of the intestate and the consul-general executed and delivered to the defendant a receipt of the amount "in full settlement of all claims and demands against the company for the death" of the intestate, and, in the name of the widow "as wife and Admx.," a release "for myself, my heirs, my executors, administrators and assigns" from all claims and demands arising or growing out of the death. The next of kin

of the intestate were three infant children residing with their mother in the village of Ozero, province of Volhynia, Russia. The four hundred dollars were paid to the Russian authorities of that province and by them deposited in a local bank to the credit of the heirs of the intestate. The appellant asserts and argues that the transaction constituted, by virtue of a power given the consul-general by the treaty to be referred to, a settlement of the cause at action.

Through the year 1909, a treaty between the United States and Russia contained the clause: "The two contracting parties shall have the liberty of having, in their respective ports, Consuls, Vice-Consuls, Agents and commissaries of their own appointment, who shall enjoy the same privileges and powers, as those of the most favored nations." The appellant correctly asserts that under this clause the powers of the Russian consul and vice-consul in the matter of settling with and releasing the defendant from the damages arising from the death of the intestate were equal to those given the consular representatives of any other nation by a treaty with the United States, and specifically refers us to the provision of the then existing treaty with Spain:

"The Consuls-General, Consuls, Vice-Consuls or Consular
326 Agents of the respective High Contracting Parties shall have, under the laws of their country and regulations of their own Government so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear. Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to perform all the duties prescribed by the laws of their country and the instructions and regulations of their own Government for the safe-guarding of the property and the settlement of the estate of their deceased countrymen".

An assertion of the respondent is that the record contains no evidence that the deceased was at the time of his death a citizen of Russia or a subject of the Czar of Russia. The complaint alleges: "That the said Stephen Mistschook was at the time of his death a resident of Rockland County and left him surviving a widow and three minor children, Eva Mistschook, Julien Mistschook and Elarion Mistschook, all dependent upon him for support and all aliens resident in Russia, Europe." The answer alleges that the intestate was, at the time of his death a subject of the Emperor of Russia. The counsel for the plaintiff, upon the trial, in the opening of the case to the jury, stated that the intestate came to this country from Russia and had arranged to bring his wife and three
327 children to this country to make them citizens of it. Through a deposition, the widow testified that on March 3, 1909, she was and prior thereto and since November 3, 1896, had been the wife of the intestate; that they were married in the village of Ozero, province of Volhynia, Russia; that they lived at Ozero until 1907,

when the intestate said good-bye to her there, telling her he was going to America. He arrived in the United States about February, 1907. He was thirty-two years old at the time of his death. The record does not disclose the country of his birth. It was thus proven that the intestate was an alien; that at the age of twenty he resided and married, and through the succeeding twelve years resided, in Russia; that his wife and children continued until his death to reside and receive there their support from him, and were aliens. The facts created the presumption that he was, while a resident, a citizen of Russia. The relation is presumed to have continued until a change of citizenship is proved. (Shelton v. Tiffin, 6 How. [U. S.] 163, 185; Hauenstein v. Lynham, 100 U. S. 483; Campbell v. Wallace, 12 N. H. 362; State ex rel. Phelps v. Jackson, 79 Vt. 504.) Moreover, the acts of the Russian consul-general under the treaty created the presumption that the intestate was a citizen or subject of Russia, because otherwise those acts would have been nugatory and mischievous. The acts of a public officer which presuppose the existence of other acts or conditions to make them legally operative are presumptive proofs of the latter. (Bank of United States v. Dandridge, 12
328 Wheat. 64; Cincinnati, New Orleans & Texas Pac. R. Co. v. Rankin, 241 U. S. 319, 327; Swarthout v. Ranier, 143 N. Y. 499, 504; Pringle v. Woolworth, 90 N. Y. 502.) "The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done." (Matter of Marcellus, 165 N. Y. 70, 77.) We conclude from the proofs that the intestate was, at the time of his death, a citizen of Russia. Concededly, he died within the territorial jurisdiction of the consul-general.

We turn next to the question, did the consul-general have the right to settle the cause of action belonging to the widow and next of kin. The alienage of the beneficiaries of the cause of action does not affect their rights under the statute (Alfson v. Bush Co., 182 N. Y. 393) and we will assume for the purposes of this case that the widow and children of the intestate, who under the statute (Code of Civil Procedure, section 1903) constituted the beneficiaries, had the right (the infants being legally represented) to settle the cause of action at any time prior to the issuance of the letters of administration on March 1, 1911. The question presented is, did the consul-general, as such, and without authority from the beneficiaries, have that right.

At the outset it should be comprehended that under our statute the cause of action is created by the statute and *it* original and not derivative. It is not a part of, and has no relation with the estate of the decedent. The damages are allowed, not for an injury
329 to his estate, but for an injury, through the loss of him, to the estate of the beneficiaries. The executor or administrator of the decedent is a mere nominal party, without any interest in the damages, holding them, when recovered, in the capacity of a trustee or agent for the beneficaries. (Hegerich v. Keddie, 99 N. Y. 258; Matter of Meekin v. Brooklyn Heights R. R. Co. 164 N. Y. 145; Kelliher v. New York Central & H. R.

R. R. Co., 212 N. Y. 207.) The claim of the beneficiaries of such a cause of action, in its inherent nature and source, is of the same quality and character as the large class of claims for injuries to the manifold varieties of property of claimants.

The rights of consuls and consular officials rest on international law as well as on treaty stipulations. International law regards them as mercantile agents of the government appointing them, authorized to protect the commercial interests of its citizens or subjects in the country to which they are accredited and clothed only with authority for commercial purposes; to conserve and guard the property within their territorial jurisdiction of their countrymen dying therein is important among their rights and duties. (The Anne, 3 Wheat. 435; Seidel v. Peschkaw, 27 N. J. L. 427; Matter of D'Adame, 212 N. Y. 214.) While it vests them with the right to interpose claims for the restitution of property belonging to the subjects of their own country, I have found no rule of international law or judicial decision indicating that it authorizes or permits them to dispose of, control or convert into another form the uninvaded and secure property of their living countrymen. The decision and opinion in The Bello Corrunes (6 Wheat. 152, 168) upholds the contrary conclusion. It is clear, I think, that the general
330 law of nations does not sustain as valid the settlement with the appellant of the consul-general, and this conclusion is assured by the fact that the counsel for the appellant does not invoke here that law. Nor has he brought to our attention any law of Russia or of this country supplementing, in this respect, international law. The treaty between the United States and Russia, in conjunction with that between the United States and Spain, of which we have already spoken, is the foundation of his claim and argument.

The Federal Constitution declares a valid treaty the supreme law of the land. (Article VI) Where a treaty affects the rights of litigants, it binds those rights and is as much to be regarded by the court as an act of Congress. (United States v. Schooner Peggy, 1 Cranch, 103; Whitney v. Robertson, 124 U. S. 190; Maiorano v. Baltimore & Ohio R. R. Co., 213 U. S. 268.) It is paramount to the Constitution and statutes of the state (Ware v. Hylton, 3 Dallas, 199, 237), but not to acts of Congress. (Head Money Cases 112 U. S. 580.) Its application to any case and its construction, if construction is needed, are, as with any other law, questions for the court.

The particular language of the Spanish treaty which, the appellant asserts, gave the consul-general the right to settle the claim, is that giving to consular officers "the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdictions; * * * and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or representatives shall themselves appeal * * * so far as compatible with
331 local laws." The argument is, the right of "representing" is the right to do for the represented persons whatsoever they

might have done for themselves, and the clauses quoted contemplate a representation without as well as with judicial proceedings. No legislative or judicial law of Russia or the state forbade the representation.

It is manifest that the language does not clearly and with certainty warrant the application and effect given it by the appellant. It is not clear that the language has any application to the widow and children of the intestate as the owners of the claim or property, which is theirs not by devolution or succession and as a part of the estate of the intestate, but through original and primary ownership. Our inquiry, therefore, is as to what, in such respect, was intended in the quoted language by the contracting governments, and in pursuing it we should adopt the same general rules, which are applicable in the construction of statutes, contracts and written instruments generally. The entire provisions of the treaty relevant to the inquiry are to be studied, the words used are to be given their natural and ordinary signification, a sensible and reasonable effect must be given unless the words forbid, and the cognate rules of international law and of the legislation of the government may be considered. (Matter of D'Adamo, 212 N. Y., 214; United States v. Choctaw, etc., Nations, 179 U. S. 494; Collins v. O'Neil, 214 U. S. 113; Geofroy v. Riggs, 133 U. S. 258.) A careful reading of the provisions of the treaty impels to the conclusion that the governments contemplated the assured conservation, administration and settlement of the estates of the citizens of either who died in the country of the other, or dying at sea, left property which was brought into the country of the other. It is the heirs, next of kin or
332 legal representatives of such citizens who are to be represented and represented as such; that is, as having an ownership or interest under the laws of intestacy in the estate of the deceased. They are to be represented as to such ownership or interest. The widow and children in the case at bar are not the subjects of such a representation. While the statute declares that the damages recovered are exclusively for the benefit of the decedent's husband or wife, and next of kin, the denomination "next of kin" in connection with the preceding designation is merely a convenient means of designating comprehensively and definitely, the distributees of the damages recovered. The damages are theirs, not through the laws of intestacy, or as a part of the estate of the intestate, but through their original right to them created by the statute. A confirmation of the correctness of such conclusion is contained in the provision that as to the countrymen of consuls who die at sea, the right of representation is not given unless the property of the deceased is brought into the consular district. The existence of an estate of the intestate in the consular district is the ground for the right to represent. The remaining language of the treaty provision denotes that the intention of the governments was to provide by it for the safeguarding of the property and the settlement of the estates of the citizens of either dying in the country of the other or at sea. The language has a completed purpose and effect if it be held to authorize the consular officers to act for the heirs, next of kin or legal repre-

sentatives of their countrymen, of the description set forth, in relation to their estates in instituting, appearing for and par-
333 ticipating in their behalf in legal or other proceedings for the proper administration, conserving and guarding of the estates. This construction is further confirmed by the fact that it harmonizes with the functions of consuls under the established international practice. (Matter of D'Adamo, 212 N. Y. 214.)

The construction urged by the appellant is not reasonable. It would permit consular officers to transfer, dispose of, or convert into a different form the property of the absent, unknown or minor heirs or next of kin of the citizens or subjects of their country who shall die within their consular jurisdiction. The vice-consul effected such a result in the present case. The right of action was a property right of the beneficiaries of it. (Matter of Meekin v. Brooklyn H. R. R. Co., 164 N. Y. 145.) The consul converted it into four hundred dollars. The construction urged by the appellant would justify his act. There is no distinction between the property right in question and the other property rights, if any, of the beneficiaries or those of others similarly situated which would guard them against the effect of such a construction. The death of a fellow-countryman of a consular officer within the consular district would place at the disposal — the officer the property of the absent, unknown or minor heirs and next of kin of the deceased. The treaty in question is one of many between this and other countries containing identical or equivalent language to which our decision would be applicable. The language and the rules controlling its interpretation forbid the construction given by the appellant.

There is no meritorious exception on the part of the appellant to the rulings of the trial justice in admitting or rejecting evidence.

334 The judgment should be affirmed with costs.

Willard Bartlett, Ch. J., Hiscock, Chase, Hogan, Cardozo and Pound, JJ., concur.

Judgment affirmed.

335 STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York, for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 22nd day of January, 1917, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 334 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of Walter G. Hamilton, County Treasurer of the County of Rockland as Public Administrator of the goods, chattels and credits of Stephen Mist-

schook, deceased, plaintiff-respondent, against Erie Railroad Company, defendant-appellant, mentioned in said Writ of Error as the same remain of record and on file in my office:

And that annexed hereto is the petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 24th day of January, 1917.

[Seal of the County of New York.]

WM. F. SCHNEIDER, *Clerk*.

Endorsed on cover: File No. 25,733. New York Supreme Court. Term No. 903. Erie Railroad Company, plaintiff in error, vs. Walter G. Hamilton, County Treasurer of the County of Rockland, as public administrator of the goods, chattels & credits of Stephen Mistschook, deceased. Filed January 30th, 1917. Flie No. 25,733.

FILED
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JAMES D. MAHER
CLERK.

Supreme Court of the United States

October Term, 1918
No. 112

ERIE RAILROAD COMPANY

Plaintiff-in-Error
(Defendant below)

against

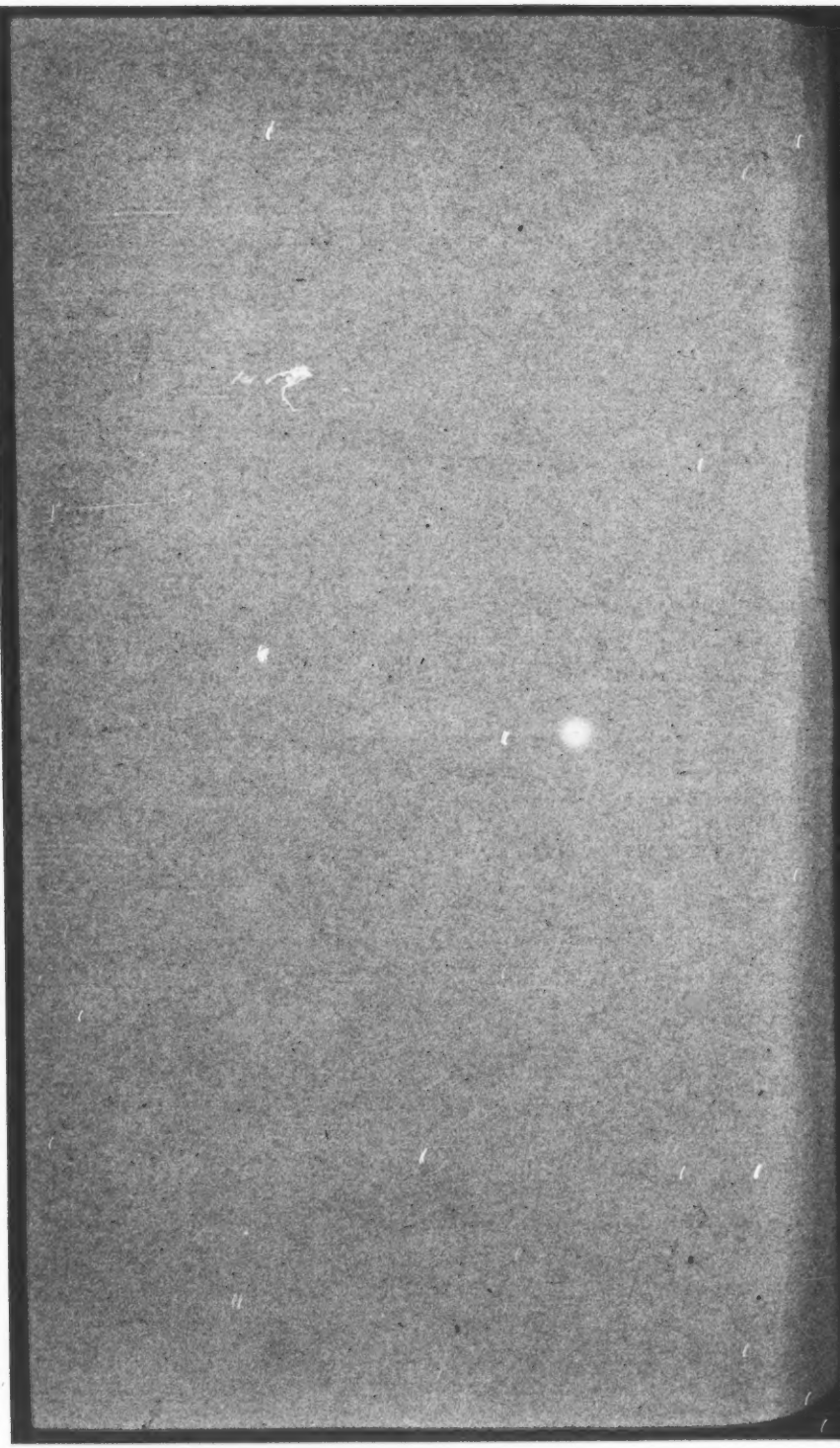
WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased.

Defendant-in-Error
(Plaintiff below)

BRIEF FOR THE ADMINISTRATOR
Defendant-in-Error

HERBERT C. SMYTH
FREDERIC C. SCOFIELD
CHARLES ANOULO
Of Counsel

Vol. 1287 Wards THE WERNHAM PRINT 38 Park St., N. Y.
—1918—



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United States Supreme Court

October Term, 1918.

No. 112.

ERIE RAILROAD COMPANY,

Plaintiff-in-Error,
(Defendant below)

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the goods, chattels and credits of Stephen Mistschook, deceased.

Defendant-in-Error,
(Plaintiff below)

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

This action comes to this court on a writ of error to the Court of Appeals of the State of New York. The action was brought to recover damages in behalf of the widow and three minor children for the death of Stephen Mistchook, the husband and father, a citizen and former resident of Russia, where his family still resided at the time of his death.

The plaintiff-in-error, prior to the appointment of the administrator, attempted to settle the claim with the Russian Consul, without the interposition of the court, or the appointment of an administrator.

The claim for which judgment has been rendered in the present action for $8066.86, was alleged to have been settled with the Consul for $400.

The question brought to this court by the writ of error is whether or not, under the treaty with Spain, invoked by the "favored nation" paragraph in the Russian Treaty, such settlement was within the consular powers of the Russian Consul, and binding upon the defendant-in-error, as administrator, and therefore a bar to and release of the cause of action set forth in the complaint.

The New York Code of Civil Procedure read, in 1909 as follows:

> "Section 1902. The executor or administrator of a decedent who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death.
>
> "Section 1903. The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

The particular portion of the Spanish Treaty

invoked is the Twenty-seventh Article of the Spanish Treaty of July 3, 1902, which reads:

"Article XXVII.

"The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own government so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear.

"Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to perform all the duties prescribed by the laws of their country and the instructions and regulations of their own government for the safe-guarding of the property and the settlement of the estate of their deceased countrymen.

"In every case the effects and property of such deceased citizens or subjects shall be retained within the consular district for twelve calendar months by said Consuls-General, Consuls, Vice Consuls or Consular Agents or by the legal representatives or heirs of the deceased during which time the creditors, if any, of the deceased shall have the right to present their claims and demands against the said effects and property, and all questions arising out of such claims or demands shall be decided by the local judicial authorities in accordance with the laws of the country to which said officers are commissioned."

The Twenty-first Article of the same treaty reads:

"XXI.

"The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two High Contracting Parties, shall have the right to address the authorities of the respective countries, national or local, judicial or executive, within the extent of their respective consular districts, for the purpose of complaining of any infraction of the treaties or conventions existing between the two countries, or for purposes of information, or for the protection of the rights and interests of their countrymen, whom, if absent, such consular officers shall be presumed to represent.

"If such application shall not receive proper attention, such consular officers may, in the absence of the diplomatic agent of their country, apply directly to the government of the country to which they are commissioned."

The question was presented by the fourth and fifth paragraphs of the plaintiff-in-error's amended answer (record, pp. 6-7) and the evidence thereunder is found in the deposition of the widow (pp. 16-17), where she refused to accept the $400. tendered by the Russian official and stated she authorized the present action; and in defendant's (plaintiff-in-error's) exhibits H, I and J, offered in evidence at page 109 and set forth in the record at pp. 192-196, being the consular appointment, voucher and release.

Argument.

Point I.

The claim for damages for death of decedent is original and not derivative. It forms no part of the estate of decedent.

Point II.

The general consular authority to represent nationals does not extend to the compromise and conversion of their original property.

Point III.

The Twenty-seventh Article of the Spanish Treaty of July 3, 1902, prescribes the consular powers relating solely to the settlement of estates of deceased countrymen.

Point IV.

The consular settlement was unauthorized by the second paragraph of the 27th Article of the Spanish Treaty.

Point V.

The Twenty-first Article of the Spanish Treaty prescribes the consular power to represent nationals in other matters than the settlement of estates.

Point VI.

The consular settlement in the case at bar was without authority and was therefore a nullity and properly disregarded by the court below.

Point VII.

The judgment should be affirmed.

POINT I.

The claim for damages for death of decedent is original and not derivative. It forms no part of the estate of decedent.

The Court below said (Record, pp. 222-223):

> "At the outset it should be comprehended that under our statute the cause of action is created by the statute and is original and not derivative. It is not a part of, and has no relation with the estate of decedent. The damages are allowed, not for an injury to his estate, but for an injury, through the loss of him, to the estate of the beneficiaries. The executor or administrator of the decedent is a mere nominal party, without any interest in the damages, holding them, when recovered, in the capacity of a trustee or agent for the beneficiaries."

Citing:

Hegerich vs. Keddie, 99 N. Y., 258;
Meekin vs. B. H. R. R., 164 N. Y., 145;
Kelliher vs. N. Y. C. & H. R. R.R. Co., 212 N. Y., 207.

> "The claim of the beneficiaries of such a cause of action, in its inherent nature and source, is of the same quality and character as the large class of claims for injuries to the manifold varieties of property of claimants."

Again at page 224:

> "While the statute declares that the damages recovered are exclusively for the benefit of the decedent's husband or wife, and next of kin, the denomination 'next of kin' in connection with the preceding designation is merely a convenient means of designating comprehensively and definitely, the distribu-

> tees of the damages recovered. The damages are theirs, not through the laws of intestacy, or as a part of the estate of the intestate, but through their original right to them created by the statute."

No conflict with the Federal Constitution or laws being involved, this construction of the state statute will be accepted by this court as conclusive.

> *Memphis Street Ry. Co., vs. Moore,* 243 U. S., 299;
> *Elmendorf vs. Taylor,* 10 Wheat., 152, 159;
> *Old Colony Trust Co., vs. Omaha,* 230 U. S., 100, 116;
> *Great West. Tel. Co., vs. Purdy,* 162 U. S., 329;
> *Burgess vs. Seligman,* 107 U. S., 20, 33;
> *Kuhn vs. Fairmount Coal Co.,* 215 U. S., 349, 358.

In fact plaintiff-in-error itself adopts that construction.

Brief of Plaintiff-in-error, Point II, page 12.

The interposition of an administrator is merely for convenience and does not change the character of the property. Many States (Pennsylvania for example) give the right of action direct to the beneficiaries.

POINT II.

The general consular authority to represent nationals does not extend to the compromise and conversion of their original property.

Defendant-in-error has no quarrel with the powers defined by the text-books quoted in Point one, pp. 6 and 7, of the Brief of plaintiff-in-error.

In fact, learned counsel for the plaintiff-in-error have failed to present to the Court a single citation of an instance where a consul has exercised authority to compromise, convert and release a chose in action belonging to a national.

The inherent functions of a consul are those of a provisional conservator.

> *Matter of D' Adamo,* 212 N. Y., 214, 223;
> *The Anne,* 3 Wheat, 435;
> *Seidel vs. Peschkaw,* 27 N. J. L., 427.

Mr. Webster and Mr. Wheaton contended in the *Bello Corrunes* case, that a consul's character was more like an attorney at law than an attorney in fact.

The Court in that case, 6 Wheat, 152, 167, said:

> "A vice-consul, duly recognized by our government is a proper party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns * * *. *Whether the powers of the vice-consul shall in any instance extend to the right to receive*

in his national character, the proceeds of property libeled and transferred into the registry of a court is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect must ever depend upon the laws of the country from which and to which, he is deputed."

The Court there directed the proceeds to be paid into the registry, to be paid over, under order of the court, to the Spanish owners.

Most of the decisions cited by plaintiff-in-error are instances where the consul has intervened in Court, in order to have the rights of his national protected and determined by judicial procedure in accordance with the rules of the forum having jurisdiction thereof.

The Bello Corrunes, 6 Wheat., 152;
London Packet, 1 Mason, 14;
Rowe vs. The Brig, 1 Mason, 372;
The Anne, 3 Wheat., 435;
Divina Pastora, 4 Wheat., 52;
The Antelope, 10 Wheat., 66;
The Adolph, 1 Fed. Cas., 87;
The Elizabeth, Fed. Cas., 4350;
The General McPherson, 100 Fed. Rep., 864;
In re Holmberg, 193 Fed. Rep., 260;
Von Thodorovich vs. Franz Josef Beneficial Assn., 154 Fed. Rep., 911.

The Conserva, 38 Fed. Rep., 431, and *Harrison vs. Vose,* 9 How., 372, are not in point.

In the *Conserva* case, the consul, in the absence of any other representative, presented the claim of his government.

In *Harrison vs. Vose,* the consul was suing in his own right to recover a penalty incurred for violation of consular laws.

In the case of *Vujic vs. Youngstown Sheet & Tube Co.*, 220 Fed. Rep., 390, the consul was only taking into custody a fixed amount determined by statute which was due to his countrymen and he applied to the Court for such relief.

The various administration cases have no application to the case at bar, for in each instance the consul in question conformed to judicial procedure.

Matter of Tartaglio, 12 Misc., 245;
Matter of Fattosini, 33 Misc., 18;
Carpigiani vs. Hall, 172 Ala., 287;
Matter of Davenport, 43 Misc., 573.

It is true that some of the courts have gone further than the Bello Corrunes case and recognized the right of the consul to receive and transmit the proceeds belonging to his countrymen.

But whether he has that power is not necessary to be determined in this case. There is a vast difference between an agency to receive and transmit a judicially determined sum, and an agency to convert, compromise and liquidate, without the intervention of a judicial proceeding, the property of the principal.

There is no incongruity in the fact that a Russian consul might be entitled to receive and transmit the proceeds in the case at bar, even though he had already unsuccessfully purported to compromise and release the identical claim. They are two distinct acts, and one might be within the scope of his authority and the other not.

As an illustration, an attorney at law, by virtue of his retainer, is authorized to appear, prosecute or defend an action in behalf of his client, to conduct all proceedings up to the entry of judgment, and collect and satisfy the judgment, *but not for*

less than the amount of the claim or judgment, unless by specific authority of the client.

The cause of action, the claim or demand sued upon, and the subject matter of the litigation are all within the exclusive control of the client; and an attorney may not impair, compromise, settle, surrender or destroy them without his client's consent.

> 6 *Corp. Juris,* 643, 659;
> *Bonnifield vs. Thorp,* 71 Fed. Rep., 924;
> *Holker vs. Parker,* 7 Cranch.. 436;
> *Miocene Ditch Co. vs. Moore,* 150 Fed. Rep., 483;
> *Humphrey vs. Thorp,* 89 Fed. Rep., 66;

No case is cited by counsel where the rights of the national are determined by the consul without intervention of a court.

The quotation of counsel for plaintiff in error in their brief on page 7 is not complete. The following is the complete quotation, the italicized matter being the portion omitted:

> "In the absence of other representatives, consuls are entitled to represent their fellow-countrymen in a foreign court of admiralty without special authority; *though they cannot, without special authority, receive restitution of the property in litigation.*"
>
> 1 Wharton's International Law Digest, Section 117 Chap. 5, citing *The Bello Corrunes,* 6 Wheat., 152.

The same authorities also say:

> "It is no part of the duty of diplomatic or consular officers to attend to the prosecution of private claims of American citizens in foreign countries, especially when the courts of justice are open to them."
>
> Wharton's International Law Digest, Vol. I, Chap. 5 , Section 123, citing Mr.

Evarts, Secretary of State, to Mr. Yoder, May 21, 1880, MMS. Dom. Lit.

"In the absence of specific powers, bestowed by competent authority, a consul has no right to receive the proceeds of property libeled and transferred into the registry of the court."

Wharton's International Law Digest, Vol. 1, Chap. 5, Sec. 124, citing *The Bello Corrunes,* 6 Wheat., 152.

"A consul of the United States has no authority to appoint a curator for an American corporation, which may at the time have in the country in which he resides no competent official upon whom legal service can be made in case of 'legal attacks' upon it."

Moore's Digest of International Law, Vol. 5, pp. 93-94, citing Mr. Gresham, Secretary of State, to Mr. Baker, No. 123, Feb. 5, 1894, MS. Inst. Central America, 237.

It is therefore submitted that a consul has no inherent power to convert, compromise, and release the property of his countryman.

POINT III.

The Twenty-seventh Article of the Spanish Treaty of July 3, 1902, prescribes the consular powers relating solely to the settlement of estates of deceased countrymen.

The Twenty-seventh Article of the Spanish Treaty (as given in 33 Statutes at Large, under Treaties and Conventions) in the two languages is as follows:

"ARTICLE XXVII.

The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own Government, so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or l e g a l representatives shall themselves appear.

Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to per-

"ARTÍCULO XXVII.

Los Cónsules Generales, Cónsules, Vice-Cónsules y Agentes Cónsulares de las respectivas Altas Partes Contratantes, tendrán, conforme á las leyes de su pais y á las instrucciones y reglamentos de su propio Gobierno, en cuanto sean compatibles con las leyes locales, el derecho de representar á los herederos ausentes, desconocidos ó menores de edad, parientes inmediatos ó representantes legales de los ciudadanos ó súbditos de su pais, que mueran dentro de su jurisdiccion consular; asi como de aquellos de sus compatriotas que mueran en el mar, cuyos bienes sean llevados á su demarcación consular; y de comparecer personalmente, ó por medio de delegado que los represente en todos los procedimientos relativos al arreglo de sus bienes, hasta que los herederos ó representantes legales comparezcan por si mismos.

Hasta que tenga lugar esta comparecencia podrán dichos funcionarios consulares, en cuanto sea compatible con las leyes locales, cumplir

form all the duties prescribed by the laws of their country and the instructions and regulations of their own Government for the safeguarding of the property and the settlement of the estate of their deceased countrymen.

In every case the effects and property of such deceased citizens or subjects shall be retained within the consular district for twelve calendar months by said Consuls-General, Consuls, Vice-Consuls or Consular Agents or by the legal representatives or heirs of the deceased during which time the creditors, if any, of the deceased shall have the right to present their claims and demands against the said effects and property, and all questions arising out of such claims or demands shall be decided by the local judicial authorities in accordance with the laws of the country to which said officers are commissioned."

todos los deberes prescritos por las leyes de su pais y las instrucciones y reglamentos de su propio Gobierno para la custodia de la propiedad y arreglo de los bienes de su difunto compatriota

En todo caso, los efectos y bienes de los ciudadanos ó súbditos difuntos serán retenidos dentro del distrito consular durante doce meses naturales, por dichos Cónsules-Generales, Cónsules, Vice-Cónsules ó Agentes Consulares, ó por los representantes legales ó herederos del difunto, durante cuyo tiempo los acreedores de aquel, si los hubiere, tendrán derecho para presentar sus reclamaciones y demandas contra dichos efectos y bienes; y todas las cuestiones que se susciten con motivo de estas reclamaciones ó demandas, se decidirán por las autoridades judiciales locales con arreglo a las leyes del pais en que dichos funcionarios están nombrados."

The Court below held that this article related solely to the settlement of estates and not to other property of next of kin of the decedent, and it is argued here that the court erred in so doing.

The Court said (Record, pp. 224-225):

"The language has a completed purpose and effect if it be held to authorize the consular officers to act for the heirs, next of kin or legal representatives of their countrymen, of the description set forth, in relation to their estates in instituting, appearing for, and participating in their behalf in legal or other proceedings for the proper administration, conserving and guarding of the estates. This construction is further confirmed by the fact that it harmonizes with the functions of consuls under the established international practice. (*Matter of D'Adamo,* 212 N. Y., 214.)

"The construction urged by the appellant is not reasonable. It would permit consular officers to transfer, dispose of, or convert into a different form the property of the absent, unknown or minor heirs or next of kin of the citizens or subjects of their country who shall die within their consular jurisdiction. The vice-consul effected such a result in the present case. The right of action was a property right of the beneficiaries of it. (Matter of Meekin vs. Brooklyn H. R.R. Co., 164 N. Y., 145.) The consul converted it into four hundred dollars. The construction urged by the appellant would justify his act. There is no distinction between the property right in question, and the other property rights, if any, of the beneficiaries or those of others similarly situated which would guard them against the effect of such a construction. The death of a fellow-countryman of a consular officer within the consular district would place at the disposal of the officer the property of the absent, unknown or minor heirs and next of kin of the deceased. The treaty in question is one of many between this and other countries containing identical or equivalent language to which our decision would be applicable. The language and the rules controlling its interpretation forbid the construction given by the appellant."

There is a further reason for so holding which

In the case of *Vujic vs. Youngstown Sheet & Tube Co.*, 220 Fed. Rep., 390, the consul was only taking into custody a fixed amount determined by statute which was due to his countrymen and he applied to the Court for such relief.

The various administration cases have no application to the case at bar, for in each instance the consul in question conformed to judicial procedure.

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There is no incongruity in the fact that a Russian consul might be entitled to receive and transmit the proceeds in the case at bar, even though he had already unsuccessfully purported to compromise and release the identical claim. They are two distinct acts, and one might be within the scope of his authority and the other not.

As an illustration, an attorney at law, by virtue of his retainer, is authorized to appear, prosecute or defend an action in behalf of his client, to conduct all proceedings up to the entry of judgment, and collect and satisfy the judgment, *but not for*

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less than the amount of the claim or judgment, unless by specific authority of the client.

The cause of action, the claim or demand sued upon, and the subject matter of the litigation are all within the exclusive control of the client; and an attorney may not impair, compromise, settle, surrender or destroy them without his client's consent.

> 6 *Corp. Juris*, 643, 659;
> *Bonnifield vs. Thorp*, 71 Fed. Rep., 924;
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> 1 Wharton's International Law Digest, Section 117 Chap. 5, citing *The Bello Corrunes*, 6 Wheat., 152.

The same authorities also say:

> "It is no part of the duty of diplomatic or consular officers to attend to the prosecution of private claims of American citizens in foreign countries, especially when the courts of justice are open to them."
>
> Wharton's International Law Digest, Vol. I, Chap. 5 , Section 123, citing Mr.

MISNUMBERED

was not called to the attention of the Court below. As will be shown in Point V. *infra*, Article XXI. of the same treaty prescribed the representative powers of the consul in all other matters. The settlement of estates, however, is a well recognized subject, covered by nearly all treaties between nations.

Bearing in mind that the only divergence in our views on consular powers is the alleged right to convert, compromise and release property rights of the absent next of kin, we now propose to show that such powers are not granted by any specific provision of the treaty.

If the "helpless condition of the absent alien heirs" required protection, Article XXI. and the inherent powers of the consul as a conservator, with a right of intervention, were ample, without attempting to spell such powers from Article XXVII.

The contention of counsel for the plaintiff-in-error, as set forth on page nineteen of his brief, is that:

> "the representation and appearance in proceedings set forth in the first paragraph of the article is a representation and appearance in behalf of living heirs or next of kin of the deceased in respect of *all* their rights arising from the death, and is not in behalf of those persons only in respect of their interest in the estate of, or property left by, the deceased."

The first clause of said first paragraph does merely provide that the Consuls, &c., of the respective high contracting parties shall have the right of representing the absent, unknown or minor heirs, next of kin, etc., of the citizens or subjects of their country who shall die within their consular jurisdiction, etc. It does not expressly state whether such representation shall only be in respect of their interest in the estate of

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the decedent or whether it shall also extend in respect to all the rights and property of said unknown or minor heirs and next of kin. But if we read the first clause of the said paragraph of said Treaty in connection with the second clause, as of course we must, it is clear that the representation referred to in the first clause extends only to the rights of the absent unknown or minor heirs and next of kin in the property left by the decedent. The English version of the second clause of said first paragraph provides that the Consuls shall have the right

> "of appearing either personally or by delegate * * * in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear."

The right of said Consuls, therefore, to represent the heirs and next of kin *in Court* is expressly limited to proceedings relating to the settlement of the estate of decedent, and this being the case, it is submitted that the right of representation *out of Court,* given to the Consuls by the first clause of the first paragraph, is likewise limited to matters relating to the settlement of the estates of their compatriots who die within their Consular jurisdiction, or who die at sea, and whose property is brought within their Consular district.

Counsel for the plaintiff-in-error appreciates the force and strength of this position, and so have endeavored to show that the English version of the said first paragraph of the Treaty is incorrect, and that the right of representation *in Court,* conferred upon said Consuls by the second clause of the first paragraph, extends to all proceedings relating to the settlement of the property of the heirs and next of kin of the decedent.

MISNUMBERED

(a) Their contention is that the Spanish word "bienes" has been improperly translated into the English word "estate".

On this alleged incorrect translation of the word "bienes", counsel for the plaintiff-in-error has worked out an argument as to the meaning of the second clause, which, although plausible if based on the English version of the said Treaty, is entirely contradicted, as we shall presently show, by the Spanish version.

It is true that the Spanish word "bienes" means property, and not necessarily the property of a decedent, but there is no word in the Spanish language exactly equivalent to the English word "estate". In translating the Spanish word "bienes" into English, however, it is customary to use the word "estate", when it is clear from the context that it is the property of a decedent to which the word "bienes" refers.

An example of this is the final clause of the second paragraph:

> "la custodia de la propiedad y arreglo de los bienes de su difunto compatriota."

translated as:

> "the safe-guarding of the property and the settlement of the estate of their deceased countrymen."

There is no reason why the phrase "arreglo de sus bienes" should be translated differently in the one instance than "arreglo de los bienes" in the other. In this last instance it is clearly translated properly, and counsel does not claim otherwise, (See Brief, p. 18). "Settlement of estate" is a clearly defined legal expression; "settlement of property" is not.

(b) Counsel again contend that "que los represente" is improperly translated, "in their behalf", and should have been translated, "who would represent them" (meaning next of kin). (See Brief, p. 17.)

This is also fallacious.

Examining the first paragraph we find "their country", "their own Government", "their country", "their consular jurisdiction", "their countrymen," "their consular district," "in their behalf," in all of which the word "their" relates to the consular officials, and lastly "their estate", where "their" refers to countrymen.

This is confirmed by the Spanish version.

"Represente" is third person singular; the plural is "representen". The subject is the pronoun "que", which refers to the only singular noun "delegado". So the phrase "in their behalf" refers to the delegate appearing in behalf of the consuls, and *not* the consuls appearing in behalf of the next of kin.

In *Rocca vs. Thompson,* 223 U. S., 332, the court said:

> "It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties."

It will thus be seen that by the construction of the Court below, as was said in the opinion, a completed purpose and effect is given.

The general subject might well be held to be:

ESTATES OF DECEASED COUNTRYMEN DYING WITHIN CONSULAR JURISDICTION.

First Paragraph.

Persons to be Represented:

Absent, unknown or minor heirs, next of kin or legal representatives of

(1) Citizens or subjects of their country, dying within consular jurisdiction.

(2) Countrymen dying at sea whose property is brought within the consular district.

Duties:

Representing above persons; and appearing in all proceedings relating to settlement of estate until they or their legal representatives shall appear.

Second Paragraph.

Until appearance, consular officers, compatibly with local laws, perform all duties prescribed by laws of their country, and regulations of their Government for the *safe-guarding of the property* and the *settlement of the estate* of their deceased countrymen.

Third Paragraph.

Prescribes the Procedure:

(1) Effects and property of decedents to be retained within consular district for twelve months;

(2) Creditors to present claims against effects and property within such period;

(3) All questions arising out of such claims to be decided by local judicial authorities

> according to laws of country to which consuls are commissioned.

There is nothing in any of the three paragraphs which prescribes powers, duties or procedure as to other property of the heirs or next of kin.

Basing their argument upon the false premise that this Article comprehends more than the settlement of estates of deceased countrymen, and that the representation of absent next of kin extends to all their property within the consular district, counsel contends, at page 21, that the word "represent" constitutes

> "the Consul the agent of the absent subjects as if with an express power of attorney from them to collect their claims through suit or settlement, as the exigencies of the case should seem to warrant",

and claims for the word "represent" the full effect of the expression "legal representatives".

The phrase "legal representatives", as used in American jurisprudence, contemplates the *alter ego* of the principal, by contract or operation of law, such as an assignee, receiver, executor, administrator or the heirs at law and next of kin as a class.

> *Mutual Life Ins. Co. vs. Armstrong,* 117 U.S., 591, 597;
> *New York Life Ins. Co. vs. Flack,* 3 Md. 341;
> 2 *Bouvier's Law Dictionary* (*Rawle's Revision*), 892.

On the other hand, the word "represent" is to be construed in connection with its use.

Agents, factors, attorneys at law, consuls, officials, directors, all "represent" the parties for

whom they are acting. The scope of authority of each is well defined by law and usage.

And so its use here should be construed in the light of the inherent and treaty-given rights of a consul to represent his nationals.

As has been said before, the representation by a consul is more similar to that of an attorney at law.

This contention is upheld by the decisions in:

Succession of Rabasse, 47 La. Ann., 1452;
Matter of Bristow, 63 Misc., 637.

In the *Rabasse* case, the appointment of an attorney to represent the French heirs was vacated, the consul having appeared in their behalf.

In the *Bristow* case, the appointment of a Special Guardian to represent alien minors was vacated, where an attorney designated by the Consul appeared in their behalf.

The Twenty-Seventh Article does not, therefore, give the Consul the right to convert, compromise and release, without judicial interposition, the other property of the absent next of kin.

POINT IV.

The consular settlement was unauthorized by the second paragraph of the 27th Article of the Spanish Treaty.

So much has been said in the previous Point that this argument will be confined solely to answering Point V. on page 24 of the brief of Plaintiff-in-error.

The second paragraph is limited to performing all prescribed duties

"for the safe-guarding of the property and the

settlement of the estate of their deceased countrymen".

The claim settled was not property of the decedent, either literally or within the spirit of the treaty. Neither was it part of his estate.

The acts of the consul certainly did not savor of conservation.

The alleged settlement occurred October 6th, 1909, about seven months after the death. (Record p. 193.) The Statute of Limitations did not run until March 3rd, 1911.

Sec. 1902, *Code of Civil Procedure, supra.*

No right was imperilled. There was no urgency of action. Seventeen months yet remained within which the next of kin might have caused an administrator to commence action.

The money was deposited in Russia, after the widow's repudiation of the settlement, on March 30th, 1910. (Record, p. 17.) Almost a year yet remained, showing there was no difficulty of communication within the statutory period.

There were no pending proceedings, endangering or threatening to foreclose the rights of the next of kin. Moreover, the right is well-recognized of the consul to have the chose in action judicially determined by the proper local authorities. He could have brought the same action that determined those rights to be worth nearly Eight thousand ($8000) dollars, instead of $400. He could have consulted his countrymen, but instead, without consultation, he practically confiscates their interests, and exceeds his powers.

The record does not show that he even consulted counsel, other than the representatives of the plaintiff-in-error railroad.

Upon such facts, it is scarcely tenable to uphold the consular settlement upon the plea that

"the treaty meant to *protect* the deceased as

to all rights that accrued from his death *to those for whom he cared and whom he might be bound, while living, to support—his wife and minor children.*" (Brief, p. 25.)

POINT V.

The Twenty-first Article of the Spanish Treaty prescribes the consular power to represent nationals in other matters than the settlement of estates.

It reads:

"ARTICLE XXI.

"The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two High Contracting Parties, shall have the right to address the authorities of the respective countries, national or local, *judicial* or executive, within the extent of their respective consular districts, for the purpose of complaining of any infraction of the treaties or conventions existing between the two countries, or for purposes of information, or for the protection of the rights and interests of their countrymen, whom, if absent, such consular officers shall be presumed to represent.

"If such application shall not receive proper attention, such consular officers may, in the absence of the diplomatic agent of their country, apply directly to the Government of the country to which they are commissioned."

This gives the consul the right to address the judicial authorities for the purpose of the protection of the rights and interests of his countrymen, whom, if absent, he shall be presumed to represent.

The powers are thereby prescribed as to the property rights of absent countrymen other than

the settlement of estates of deceased countrymen dying in his consular jurisdiction.

They are again limited to intervention and conservation by means of judicial proceedings..

No right of independent action is given to him.

The representation is for the purpose of addressing the authorities, not of converting the property of the countrymen.

The fact that this Article provides for the protection of other rights of countrymen supports the argument that Article XXVII. does not so provide, rather than the contrary argument urged by counsel at page 20 of the Brief of plaintiff-in-error.

There was no necessity for making provision in both Articles, and the presumption is that each has its separate application.

POINT VI.

The Consular settlement in the case at bar was without authority, and was therefore a nullity, and properly disregarded by the Court below.

Counsel, in their Point IV., page 23, urge that the authority of the Consul having been shown, his action could not be avoided except for cause, such as proof of fraud.

We now urge that his action having been shown to be entirely *without* the scope of his authority, his action was a nullity and should be disregarded.

Again bearing in mind the analogy of an attorney at law and the fact that an attorney at law cannot impair, compromise, settle, surrender or destroy the cause of action of his client without

his consent (Point II. supra), the courts have held that where an unauthorized compromise has been made, the client may ignore it and proceed with the suit or institute a new suit as if no such compromise had ever been made.

6 *Corp. Juris*, 660;
Harper vs. National L. Ins. Co., 56 Fed. Rep., 281.

So here, the Consular settlement was a nullity, and no bar to the present action.

POINT VII.

The judgment should be affirmed.

CHARLES C. SANDERS,
Attorney for Defendant-in-Error.

HERBERT C. SMYTH,
FREDERIC C. SCOFIELD,
CHARLES ANGULO,
Of Counsel.

FILED
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JAMES D. MAHER,
CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR (DEFENDANT BELOW),

against

WALTER G. HAMILTON, COUNTY TREASURER OF THE COUNTY OF ROCKLAND, AS PUBLIC ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF STEPHEN MISTSCHOOK, DECEASED, DEFENDANT IN ERROR (PLAINTIFF BELOW).

ANSWER TO SUPPLEMENTAL BRIEF.

There was no error committed by the trial court in rejecting defendant's Exhibits K and L for identification and no error was committed by the Court of Appeals in approving such rejection.

The documents offered consisted merely of an unsworn statement by a peasant that he signed the receipt for the widow, who was illiterate, and at her personal request. This paper was witnessed by an elder and enclosed in a letter of the Governor of the Province. The Russian Consul-General merely certified the English translation to be a correct translation of a Russian document.

The document was not a public record from the files of any public office of the Russian Government. It was merely the rankest hearsay, and all the authentication in the world would not make an inadmissible document admissible.

Authentication merely certifies to the genuineness of the document and the authority of the officials certifying to the same.

Conceding, for the purpose of argument, the genuineness of the document, a mere statement by a peasant that he was requested to sign a receipt by another person, who was illiterate, would not be admissible in evidence upon any theory.

First, it is well settled that the authority of an agent cannot be proven by his own testimony.

Second, if documents of this character were admitted in evidence merely because authenticated as to translation, there would be no necessity of issuing commissions and taking testimony under oath, because all that would be necessary would be to procure an *ex parte* statement of the proposed witness, have the translation authenticated by a consular official, and upon the argument of counsel presented here, such a statement would be admissible.

In *Church vs. Hubbart*, 2 Cranch, 187, at page 237, the court held (quoting syllabus):

> "Foreign laws must be proved like other facts. They must be verified by oath, or by some other such high authority that the law respects not less than the oath of an individual.
>
> "The certificate of a Consul of the United States under his seal is not sufficient. A certificate of the proceedings of a court under the seal of a person who states himself to be the secretary of foreign affairs in Portugal, is not evidence."

The court also said:

> "In this case the edicts produced are not verified by an oath. The Consul has not sworn; he has only

certified if they are truly copies from the original. To give to this certificate the force of testimony it will be necessary to show that this is one of those Consular functions to which, to use its own language, the laws of this country attach full faith and credit.

* * * * * * *

"The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the Consul as well as by his certificate.

"It is asked in what manner this oath should itself have been authenticated, and it is supposed that the Consulate seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the Commissioners have authority to administer oaths, and to certify the depositions by them taken."

Again the court said:

"Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to have been read on the certificate of the Consul. Interpreters are always sworn, and the translation of a Consul not on oath can have no greater validity than that of any other respectable man."

It is also well settled that authentication of private documents does not make them of any greater probative force unless it is shown that the law of the country requires the documents to be deposited or recorded in the office of the official whose certificate is authenticated.

In the case at bar the documents offered do not purport to have been taken from the files of any public office.

Upon all the above grounds it is respectfully submitted that the action of the courts below was proper.

As the supplemental brief of plaintiff in error was served late on December 17th, and did not come to the attention of counsel until the morning of the 18th, it is respectfully requested that if the same is received by the court, counsel for defendant in error may submit a more well-considered reply than has been possible within the short time permitted.

CHARLES C. SANDERS,
Attorney for Defendant in Error.

HERBERT C. SMYTH,
FREDERIC C. SCOFIELD,
Of Counsel.

Office Supreme Court, U. S.
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JAMES D. MAHER,
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- 4 -

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
against (*Defendant below*),

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of STEPHEN MISTSCHOOK, Deceased,
Defendant-in-Error,
(*Plaintiff below*).

Brief for the Erie Railroad Company, Plaintiff-in-Error.

FREDERIC B. JENNINGS,
WILLIAM C. CANNON,
For Plaintiff-in-Error.

C. G. BURGOYNE PRINTING BUSINESS, 72-78 Spring St., New York.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
(Defendant below.)

AGAINST

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Deceased,
Defendant-in-Error,
(Plaintiff below.)

BRIEF FOR ERIE RAILROAD COMPANY.

Statement.

This is a writ of error to review a judgment entered in the New York Supreme Court on a remittitur from the Court of Appeals of that State. The decision of that Court of Appeals was that the 27th Article of the treaty between the United States and Spain, July 3, 1902, 33 U. S. Stat. at Large, Vol. II. (which under the "most favored nation" clause in the Russian treaty applied to Russia) did not authorize the duly

accredited Russian Consul to represent Irene Mistschook, widow of Stephen Mistschook, and their three minor children—the said widow and children being subjects of Russia and residing there—in respect to the claim against the Erie Railroad Company for the death of said Stephen Mistschook and in the settlement of said claim. The facts were that said Stephen Mistschook, an alien and a subject of Russia, was on the 3d day of March, 1909, struck and killed by a train of the Erie Railroad Company at Sloatsburg, New York. In October, 1909, the Russian Consul, at New York, in whose jurisdiction the deceased resided and where his death took place (Transcript of Record, p. 109), and long before the appointment of an administrator, settled the claim of the said widow and children, arising under sections 1902–1905, New York Code of Civil Procedure, giving a receipt and release therefor (Transcript of Record, pp. 109, 110, 193, 194). The relevant parts of these sections as they were in March, 1909, are as follows:

> SECTION 1902. "The executor or administrator of a decedent who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death."
>
> SECTION 1903. "*The damages recovered in an action,* brought as prescribed in the last section, *are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff as if they were unbequeathed assets,* left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue; which must be allowed by the

surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

Under sections 1905, 1870 and 2732 of the Code of Civil Procedure as they were in 1909, the children of the deceased were his next of kin.

On October 6, 1909, the Russian Consul, prior to the appointment of any administrator, evidently impressed with the doubt as to contributory negligence on the part of said Stephen Mistschook—a doubt that the New York Court of Appeals disposed of on the doctrine of the case of *Parsons v. Syracuse, B. & N. Y. R. R. Co.*, 205 N. Y., 226 (Transcript of Record, p. 220)—settled the claim for $400 which was paid by the Erie Railroad Company, and gave a receipt therefor over his official seal of office (Exhibit I, Transcript of Record, p. 193). The Consul also executed over his official seal and delivered to the defendant a release of all claims arising out of the death of said Mistschook (Exhibit J, Transcript of Record, p. 194). This money was forwarded to the Russian authorities of the province of Lutzk, in which the widow lived, and it was deposited in the Imperial Savings Bank to the account of said widow and children (Transcript of Record, p. 17). Nearly two years afterwards and on March 1, 1911, the plaintiff below, defendant-in-error, Walter G. Hamilton, was appointed public administrator (Transcript of Record, p. 190) and brought an action in the New York Supreme Court for damages for the death of said Stephen Mistschook, which resulted in a verdict for the plaintiff for $6,000.

The New York Court of Appeals, although admitting that the favored nation clause of the Russian Treaty of December 18, 1832, Article VIII., 8 U. S. Stat. at Large, 444, 448, made applicable the 27th Article of the Spanish Treaty of July 3, 1902, held that said 27th Article did not authorize the Russian Consul to represent the heirs or make said settlement, on the ground that in its opinion the claim for the death of the said Stephen Mistschook was not a part of his estate, and that the said 27th Article of the Spanish Treaty as construed ap-

plied only to estates of deceased persons, and did not cover the independent claim of the widow and next of kin given as damages to them rather than to the estate of the deceased.

Specification of Errors.

(1) The New York Court erred in holding that the settlement of the Russian Consul with the Erie Railroad Company for the death of Stephen Mistschook was not a bar (because not warranted by treaty) to the action of the administrator, plaintiff below, subsequently appointed.

(2) The New York court erred in holding that because the claim for damages for the death of Stephen Mistschook was not a part of his estate, the 27th Article of the Spanish Treaty of July 3, 1902, did not warrant the Russian Consul's representation of his absent widow and minor children.

(3) The New York court erred in holding that the 27th Article of the Spanish Treaty did not mean that the consul might represent the absent, unknown or minor heirs or next of kin of the deceased in more than matters strictly a part of his estate.

(4) The New York court erred in holding that the 27th Article of the Spanish Treaty did not authorize the Russian consul to represent the absent, unknown or minor heirs or next of kin in regard to all other rights arising out of the death here of a Russian subject.

(5) The New York court erred in deciding against the validity of the authority exercised under the United States by said Imperial Russian Consul General, at New York, acting by P. d'Adomovitsch, Vice-Consul.

(6) The New York court erred in holding that the Spanish Treaty's authority to the Consul to take steps "for the safeguarding of the property and the settlement of the estate" did not warrant the Consul's settlement herein.

(7) The New York court erred in giving judgment for the defendant-in-error.

ARGUMENT.

POINT I.

As to the powers and authority of consular officers to represent their nationals.

POINT II.

Meaning of the Twenty-seventh Article of the Spanish Treaty of July 3, 1902.

POINT III.

Immateriality of the question whether or not the claim for damages for the death of a person is a part of the estate of the deceased.

POINT IV.

Since the Twenty-seventh Article of the Spanish Treaty constituted the Consul the representative of the absent widow and next of kin, as much as a judicial appointment of an administrator or guardian, his action could not be avoided except for cause, such as proof of fraud.

POINT V.

The Russian Consul's settlement was also authorized by the second paragraph of the 27th Article of the Spanish Treaty.

POINT VI.

The judgment should be reversed.

POINT ONE.

As to the powers and authority of consular officers to represent their nationals.

A Consul is the legal representative of his absent and otherwise unrepresented countrymen, and as such he may assert their rights in court by appearing in pending proceedings and by instituting suit as their representative, and he may receive and receipt for their property. Unlike the diplomatic officers who represent their government, the Consul represents their fellow countrymen as individuals.

> " Consuls differ from diplomatic agents (by whatever name they may be known) and the latter are the representatives of one State or Government to another, while *Consuls are the representatives of the individuals of the nation sending them*, empowered to protect individual interests and to procure for their fellow-citizens, so far as possible, the same protection to their rights that they enjoy at home."
>
> Schuyler, American Diplomacy, 1886, II. " Our Consular System," pages 41, 42.

> " A consul has power to appear before any court or tribunal in case of necessity, on behalf of any member of his nation who may be absent, incapable or not well represented."
>
> Field's international Code, § 639, page 431, citing Treaty between United States and New Granada, May 4, 1850, Art. III., and Bluntschli, Droit International Codifie, § 256, 1 Kent's Commentaries, 43, to the effect that special authority from the parties in interest is not necessary.

> " Besides endeavoring to obtain redress for specific wrongs, a consul exercises a general protective supervision in respect of both the persons and property of

British subjects to guard them, so far as may be from the likelihood of injury and to afford them all reasonable assistance."

Foreign Jurisdiction of British Crown, W. E. Hall, page 74 (1894).

"In the absence of other representatives, consuls are entitled to represent their fellow-countrymen in a foreign court of admiralty without special authority."

1 Wharton's Int. Law Digest, Section 117.

"A consul, though a public agent, is clothed with authority only for commercial purposes. He has a right to interpose claims for the restitution of property belonging to subjects of his own country * * *."

Moore Dig. Int. Law, Vol. 5, Page 24, citing The Anne (1818), 3 Wheat, 435, 445; The Lilla, 2 Sprague, 177, and also Viveash v. Becker, 3 Maule & Selwyn, 284.

"They (consuls) have the right and the duty to cause to be respected in foreign countries the rights of their countrymen who are absent, or insufficiently represented, and for that purpose may take all measures which they judge necessary and proper."

Bluntschli, Droit International Codifie, Sec. 254.

"Nearly all the treaties recognize the consuls' right to address local authorities, whether judicial or administrative, to defend officially the rights and interests of their countrymen."

H. Bonfils, International Law, Section 769.

The right of a consul to represent his absent national, in asserting or defending the property rights of the latter, has been frequently recognized. Some of the cases illustrative of the attitude of the courts are here given.

In the case of *Bello Corunnes*, 6 Wheat, 151, it is clearly and conclusively held that the Spanish Consul has the right to appear for and assert the rights of his countrymen

in an action without any special power of attorney. Here the consul appeared on behalf of unknown claimants of property. Of course his appearance was without any power of attorney or special procurement of the parties in intersst.

In the *London Packet*, 1 Mason, 14, the Spanish Consul claimed goods captured on a British vessel by an American privateer on behalf of a Spanish owner, G. Marino. It was held that the consul was authorized to put in a claim on behalf of the subjects of his country.

In the case of *Rowe v. The Brig*, 1 Mason, 371, a claim was interposed by the Spanish Consul for the property as belonging to certain Spanish subjects unknown. The cargo was ordered sold and the proceeds were ordered brought into court for distribution. It does not appear that there was anywhere any objection raised to the appearance of the Spanish Consul on behalf of the unknown heirs.

In *The Anne*, 3 Wheat, 435, it was held that a consul has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country.

In the *Divina Pastora*, 4 Wheat, 510, a vessel was captured and claimed as a prize. The Spanish Consul put in a claim on behalf of the alleged Spanish owners whom he did not know. The lower court decreed restitution to the consul on behalf of the Spanish claimants. The question in the case thereafter went off on a point of pleading, but the right of the Spanish Consul to maintain his claim was never questioned.

In *The Antelope*, 10 Wheat, 66, a number of slaves were captured in a vessel hovering near the American coast. The Spanish and Portuguese Vice-Consuls put in claims for them on behalf of the alleged Spanish and Portuguese owners. It was held that the Consuls had the burden of proving the number of slaves that belonged to the subjects of their country and of designating them, but the right of either the Spanish or the Portuguese Consuls to make the claims was not denied.

In *The Ship Adolph*, 1 Fed. Cas., 87, a request was

made by the French Consul that the sheriff be directed to pay into Court the proceeds of a sale of property libeled for salvage, on behalf of the French owners who were known. It was held that a foreign consul has authority to petition the court to have paid into court the proceeds in which the citizens as subjects of his country are interested they being absent and having no other legal representatives in the United States.

In *Vujic v. Youngstown Sheet & Tube Co.*, 220 Fed. Rep., 390, the Austrian consul sued in his official capacity to require the payment to him of the amount of an award under the Ohio Workmen's Insurance Act made on account of the death of an alien, whose wife and infant son resided in Austria. The Court said :

> " The provisions of these laws and regulations are so ample, and drawn to cover such a variety of circumstances, that they leave the court no other alternative than to assume that *the consul of the dual monarchy within his district is the standing, fully authorized, and qualified personal and immediate representative, for all purposes, of a citizen of his country, residing at home,* having any interest to be cared for within the consular district, and that this authority is so complete and so unmistakable that a specific power of attorney from a home-residing citizen of his country, for whom he assumes to act here, is neither necessary to strengthen it nor capable of adding any additional force * * *."

In the case of *In re Tartaglio's Estate*, 33 N. Y. Suppl., 1121 (1895), an application was made by the Consul General of Italy at New York to have paid to him the distributive shares of the widow and five minor children in the estate of Libretto Tartaglio, deceased, an Italian subject who died leaving personal property which had been administered in this country, and which distributive shares had been deposited with the county treasurer pursuant to

a decree of the court. The court says, quoting Kent: "The practice of our courts is that a foreign consul may assert and defend as complainant party the rights and property of a person of his nation." The Court goes on to state: "The consul of a foreign nation recognized by the United States is competent to defend and watch over the interests of persons of his nation and may bring suits for such purpose without any special authority from the parties in interest."

In the case of *Fattosini's Estate*, 67 N. Y. Suppl., 1119, the Court said: "It has been said that a foreign consul without specific authority has the general right to protect the rights and property of a person of his nation within the jurisdiction of his consulate."

In the case of *Succession of Rabasse*, 47 La. Ann., 1452, 17 So., 867, the Court says: "In our view, the stipulation in this treaty (meaning the treaty between the United States and France) puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs." And on a rehearing the Court says: "Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French consul, with the same effect as if the delegate held their power."

In *Matter of Davenport*, 43 Misc., 578 (N. Y.), the *Tartaglio* decision was followed by the Surrogate, who held that the Italian Consul was entitled to receive the balance belonging to the next of kin of a deceased Italian subject, when the next of kin resided in Italy. That case is pertinent to the one at bar, in that there had been an administration upon the estate, the public administrator held the balance of the estate which belonged to the next of kin, and the administrator was directed by the Surrogate to pay over the proceeds to the Consul. In the case at bar the plaintiff is the public administrator, and if, under the *Davenport* decision the Consul is authorized to take the proceeds of this suit from

the plaintiff, then the Consul must have had the right to take the proceeds of the claim for the death of the deceased from the defendant in the first instance and before the public administrator had been appointed. Otherwise we have the absurd result, if the judgment in this case is paid to the plaintiff, that he will be required to turn over such proceeds to the Consul, who has already settled the claim.

In his function as protector and preserver of the interests of absent claimants, no greater power is involved in receiving and receipting for property arising from the death of a deceased alien than in appearing in legal proceedings and engaging in the trial of causes on behalf of the absent claimants. In the *Tartaglio* case *(supra)* it was said :

> " The right to demand and sue for necessarily implies the authority to acquit and release."

In each of the following cases the court recognized in one form or another the right of a consul to represent his absent national in appearing in, instituting, or receiving the proceeds of, a litigation.

In re Szabo's Estate, 143 N. Y. Supp., 678.
The Gen. McPherson, 100 Fed., 860.
Carpigiani v. Hall, 172 Ala., 287 ; 55 So. Rep., 248.
The Elizabeth, Fed. Cas., No. 4350.
The Conserva, 38 Fed. Rep., 431.
Harrison v. Vose, 9 How., 372.
In re Holmberg, 193 Fed. Rep., 260.
von Thodorovick v. Franz Joseph Assc'n., 154 Fed. Rep., 911.

POINT TWO.

Meaning of the Twenty-seventh Article of the Spanish Treaty of July 3, 1902.

The rights given by the New York statute for the death of a decedent are property rights belonging to the persons for whom the cause of action was created.

Matter of Meekin v. B. H. R. R., 164 N. Y., 145.

And a payment to the beneficiaries named in the statute is a bar to any subsequent action of an administrator.

McGurty v. New Amsterdam Co., 115 N. Y. Appellate Division, 668.
Matter of Brennan, 160 N. Y. Appellate Division, 401.
Mella v. Northern S. S. Co., 127 Fed. Rep., 416.
See Note, *Lawyers' Rep. Ann.* (N. S.), p. 207.

If, therefore, the Russian Consul was authorized to represent the widow and next of kin under the applicable treaty provisions, his acts must bind them and no recovery can be had by the public administrator in this suit.

The first paragraph of the 27th Article of the Spanish Treaty upon which plaintiff in error relies is as follows :

"ARTICLE XXVII.

> The Consuls-General, Consuls, Vice Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own Government, so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction ; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear."

The New York Court of Appeals in this case held that the 27th Article of the Spanish Treaty of July 3, 1902, did not authorize the Russian Consul's settlement herein, and based its opinion upon a construction of this article as applying only to *estates* of deceased persons and matters relating thereto. Thus the court, speaking through Mr. Justice COLLIN, in Hamilton v. Erie Railroad Company, 219 N. Y., 343, said :

First, at page 350 (transcript of record, p. 222) :

> " At the outset it should be comprehended that under our statute the cause of action is created by the statute and is original and not derivative. It is not a part of, and has no relation with, the estate of the decedent."

Again, at page 353 (transcript of record, p. 224) :

> " A careful reading of the provisions of the treaty impels to the conclusion that the governments contemplated the assured conservation, administration and settlement of the estates of the citizens of either who died in the country of the other, or dying at sea, left property which was brought into the country of the other. It is the heirs, next of kin or legal representatives of such citizens who are to be represented and represented as such ; that is, as having an ownership or interest under the laws of intestacy in the estate of the deceased."

And still again, at page 354 (transcript of record, p. 224) :

> " The existence of an estate of the intestate in the consular district is the ground for the right to represent. The remaining language of the treaty provision denotes that the intention of the governments was to provide by it for the safeguarding of the property and the settlement of the estates of the citizens of either dying in the country of the other or at sea. The language has a completed purpose and effect if it be

held to authorize the consular officers to act for the heirs, next of kin or legal representatives of their countrymen, of the description set forth, in relation to their estates * * *."

I. The construction given to this Article by the Court of Appeals is clearly opposed to the intention of the parties to the treaty and to the reasons which existed for the enactment of this provision. It was clearly intended to authorize the Consul, under the circumstances stated, to represent and generally protect the rights of absent or minor heirs in any way growing out of the death of the deceased. In other words, prior to the appointment of an administrator, to do everything which an administrator might do.

The circumstances which suggested and determines this grant of authority is not the nature of the rights or property to be administered but the helpless condition of the absent alien heirs. And clearly any right which they may have growing out of the death of the deceased requires and should be entitled to such protection.

No conceivable reason can be suggested why the Consul should be allowed to represent such absent, perhaps, minor, alien heirs in respect of one kind of right or class of property to which they are entitled by reason of the death of the deceased rather than another. Their need of help is just as great in one case as another and it was to relieve this need that this power was given to their consular representatives.

There can be no possible reason why the Consul should be allowed to represent such heirs in respect of a claim which their father may have had, and not in respect of a claim which the statute gives to his representative for their benefit for damages caused by negligence resulting in his death. This interpretation of the article does not require the effect suggested by the Court of Appeals that the Consul's authority would relate to *all* rights of absent heirs. The provisions concern the protection of property of a deceased alien and the

rights which accrue to the absent relatives from the death, and we submit that such is the plain purpose of the treaty.

II. It appears from the Spanish text that the New York Court of Appeals misconstrued the scope of this 27th Article of the Spanish Treaty by deciding that it did not allow representation of the heirs or next of kin except in connection with the property of the deceased in distinction from their rights generally, arising or accruing to them by reason of the death of the deceased, and interpreted the word "estate" in the last clause of the first paragraph too literally and technically instead of affording to it the broader meaning intended by the law-makers.

This Twenty-seventh Article of the Spanish Treaty (as given in 33 Statutes at Large, under "Treaties and Conventions") in the two languages is as follows:

"ARTICLE XXVII.

The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own Government, so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs

"ARTÍCULO XXVII.

Los Cónsules-Generales, Cónsules, Vice-Cónsules y Agentes Cónsulares de las respectivas Atlas Partes, Contratantes, tendrán, conforme á las leyes de su pais y á las instrucciones y reglamentos de su propio Gobierno, en cuanto sean compatibles, con las leyes locales, el derecho d representar á los herederos ausentes, desconocidos ó menores de edad, parientes immediatos ó representantes legales de los ciudadanos ó subiditos de su pias, que mueran dentro de su jurisdiccion consular; asi como de aquellos de sus compatriotas que mueran en el mar, cuyos bienes sean llevados á su demarcación consular; y de comparecer

or legal representatives shall themselves appear.

Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to perform all the duties prescribed by the laws of their country and the instructions and regulations of their own Government for the safe-guarding of the property and the settlement of the estate of their deceased countrymen.

In every case the effects and property of such deceased citizens or subjects shall be retained within the consular district for twelve calendar months by said Consuls-General, Consuls, Vice-Consuls or Consular Agents or by the legal representatives or heirs of the deceased during which time the creditors, if any, of the deceased shall have the right to present their claims and demands against the said effects and property, and all questions arising out of such claims or demands shall be decided by the local judicial authorities in accordance with the laws of the country to which said officers are commissioned."

personalmente, ó por medio de delegado que los represente en todos los procedimientos relativos al arreglo de sus bienes, hasta que los herederos ó representantes legales comparezcan por si mismos.

Hasta que tenga lugar esta comparencia podrán dichos funcionarios consulares, en cuanto sea compatible con las leyes locales, cumplir todos las deberes prescritos por las leyes de su pais y las instrucciones v. reglamentos de su propio Gobierno para la custodia de la propiedad y arreglo de los bienes de su difunto compatriota.

En todo caso, los efectos y bienes de los ciudadanos ó súbitos difuntos serán retenidos dentro del distrito consular durante doce meses naturales, por dichos Cónsules-Generales, Cónsules, Vica-Consules ó Agentes Consulares, ó por los representantos legales ó herederos del difunte, durante cuyo tiempo los acreedores de aquel, si los hubiere, tendrán derecho para presentar sus reclamaciones y demandas contra dichos efectos y bienes; y todas les cuestiones que se susciten con motivo de estas reclamaciones ó demandas, so decidirán por las autoridades judiciales locales con arreglo á las leyes del pais en que dichos funcionarios están nombrados."

The article as a whole is designed to protect, in case of the death of a subject of one of the two contracting parties in the territories of the other, first, the rights of the absent, or (whether absent or present) unknown or minor heirs or next of

kin—all these classes needing some representative,—which may arise out of that death ; and second, the rights involved in his estate.

The first paragraph of this article, then, deals with the rights of the living, while the last two paragraphs deal with the estate itself of the deceased. This is made clear by an examination of the Spanish text. It shows that the first paragraph gives Consuls the right to represent the absent and minor heirs or next of kin of their compatriots dying within their Consular jurisdiction, as well as the heirs or next of kin *of* those ("de aquellos") dying at sea "whose *property*" ("cuyos *bienes*") is brought within the Consular district; and of appearing in their behalf—behalf of the heirs or next of kin—in the settlement of their rights ("de sus *bienes*")—that is, the rights of the heirs or the next of kin—until these heirs themselves appear to look after their own interests. The translation of the Spanish words "que los represente" into the English "in their behalf" is also questionable, and it would more closely follow the Spanish text if translated "who would represent *them*," and thus clearly indicate that the representation of the Consul was for the absent next of kin. The word "their" appears twice in the last clause of the first paragraph and it can only relate to the living next of kin. The Consul is authorized to appear "in *their* behalf in all proceedings relating to the settlement of *their* estate until such heirs or legal representatives shall themselves appear," Of course, the Consul could not appear for the deceased, and such appearance could only be for the absent or minor heirs or next of kin. The words "their estate" which follow must also refer to the rights or property of the absent next of kin and not the estate of the deceased which may be conserved and administered under the local laws as provided by the second and third paragraphs of the article.

That the last clause of the first paragraph regarding the Consul's right to appear "in all proceedings relating to the

settlement of their estate until such heirs or legal representatives shall themselves appear," does not refer to the estate of the deceased seems conclusively established by the fact that the second paragraph immediately proceeds to provide that the consular officers shall be permitted to perform appropriate duties "for the safe-guarding of the property and the settlement of the estate of their deceased countrymen." Otherwise, the last part of the first paragraph amounts to nothing more than a needless assertion of rights included in the scope of the second paragraph. For any act authorized by the last clause of the first paragraph—if interpreted as referring to the estate of the deceased—would certainly be included in the scope of the second paragraph.

Furthermore, the English word "estate" used in the last clause of this paragraph, and which the Court of Appeals held limited the entire paragraph to matters relating to such an estate, is not the equivalent given for the Spanish word "bienes" in the earlier part of the paragraph, and is misleading, because it instinctively suggests a reference to the property left by the deceased rather than to the property claims of the heirs or next of kin, thus making the adjective "their" (used in connection with this word "estate") appear to have reference to the deceased rather than to the heirs or next of kin. It will be observed that in the first paragraph, where reference is made to the property of seamen brought into the Consular district and twice in the third paragraph, the meaning of the word "bienes" is rendered, not as "estate" but as "property." If the word "property" is substituted for the word "estate" in the last clause of the first paragraph, which is the English equivalent for the Spanish word "bienes" that is generally employed elsewhere in the Article, the meaning of the paragraph is clear and supports the authority of the Consul to represent his absent living countrymen. The Court of Appeals based its decision upon the use of the word *estate* as indicating that only the property of the deceased was

dealt with in the paragraph and if the word "property" is used, as it is usually in the Article where the Spanish word "bienes" appears, instead of the word "estate," the reasons assigned for the Court of Appeals ruling cannot be asserted.

It must, therefore, follow that the representation and appearance in proceedings set forth in the first paragraph of the article is a representation and appearance in behalf of living heirs or next of kin of the deceased in respect of all their rights arising from the death, and is not in behalf of those persons only in respect of their interest in the estate of, or property left by, the deceased. The reasons for a representation in regard to the statutory claim for damages accruing to the absent aliens are the same as for a representation in regard to the property of the deceased, which may be termed his estate. And there is no reason why the powers of the consul should be limited to rights in the estate as such. We submit the construction claimed was the intention of the parties to the treaty, and the language itself does not reasonably bear any other construction.

It will be noticed that the second paragraph of this 27th Article deals with the protection of estates of deceased subjects, while the third paragraph deals with the fulfillment of obligations, and thus the entire subject of rights and liabilities arising out of the death of a subject of one country in the territory of the other is provided for by the terms of the article.

Regarding a treaty drawn up in two languages: In *U. S. v. Percheman*, 7 Pet. 51, the Court (when construing the language of the eighth article of the Spanish Treaty of February 22, 1819, which provided that the grants of lands situate in the territory ceded by Spain "shall be ratified and confirmed", or according to the Spanish version "shall remain ratified and confirmed") reversed its previous construction, based on the English text only, made in *Foster & Elam v. Neilson*, 2 Pet. 253, 314, 315, to the effect that the language was that of contract and not self-executing and held, at pages 88 and 89 of the

Percheman case, that in reconciliation with the Spanish text the language was self-executing and meant that the grants, were thereby ratified.

The Court said :

> " The treaty was drawn up in Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical. The Spanish has been translated, and we now understand that the article, as expressed in that language, is, that ' grants shall remain ratified and confirmed to the persons in possession of them, to the same extent, &c.'--thus conforming exactly to the universally received doctrine of the law of nations. If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. * * * No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words ' shall be ratified and confirmed,' are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they ' shall be ratified and confirmed ' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable."

That in the 27th Article of the Spanish Treaty of July 3, 1902, the rights of the living were within the intention of the contracting parties, it will be noted that in Article 21 of the same treaty it is provided that the Consul may apply to the national or local authorities for the protection of the rights and interests of their fellow countrymen, " whom, if absent, such Consular officers shall be presumed to represent."

III. Even if the word " estate " is held to be appropriately employed in the first paragraph, yet the question still arises, under the treaty provisions above quoted, whether the Consul possessed the authority to represent his coun-

trymen residing in Russia, to collect the claim and give acquittance therefor. It will be observed that the designated powers of the Consul are cumulative, and they do not qualify nor construe one another. The language is that "The Consuls-General * * * shall have * * * the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea * * *; *and* of appearing * * * in all proceedings relating to the settlement of their estate * * *."

The clauses contemplate a representation of the absent aliens as regards their rights arising from the death of a compatriot, as well as a representation in judicial proceedings regarding the estate of the deceased. The right to appear in proceedings relating to the *estate* of the deceased countryman is an additional right to that expressed in the earlier clauses of the paragraph, namely, the right to *represent* the absent heirs and next of kin. Furthermore, the right of representation is, by the terms of the treaty, only limited by the laws and instructions of the foreign government and the local laws, and to say that the representation of the absent heirs or next of kin is authorized only in respect of the estate of the deceased in which such heirs or next of kin may be interested is, we submit, to do violence to the very language of the treaty.

The words in the 27th Article "represent," is aptly used to constitute the Consul the agent of the absent subjects as if with an express power of attorney from them to collect their claims through suit or settlement, as the exigencies of the case should seem to warrant. The United States Supreme Court in *Mutual Life Insurance Co. v. Armstrong*, 117 U. S., 591, 597, said that "The term 'legal representatives' * * * is sufficiently broad to cover all persons who, with respect to his property stand in his place and represent his interests, whether transferred to them by his act or by operation of law."

Beall v. Elder, 34 La. Ann., 1098, 1099, held, where a statute providing a mode for reviving judgments directed that suits should be filed against the original defendant or his representative, that:

> "It is well settled in our jurisprudence, that the word 'representative,' as used in this statute, 'simply means the agent or attorney in fact, if the defendant be living, or the executor, curator or administrator or heir, as the case may be, if he be dead.' Chapman v. Nelson, *et al.*, 31 Ann., 343."

There was no local law which was incompatible that the acts of the Consul of the Russian Government. The Russian Consul is, then, by virtue of the treaty, with the consent of the United States, the legally constituted representative of the absent heirs or next of kin—his Government's subjects—and they, in turn, his wards, so to speak, and his act was binding upon them.

POINT THREE.

Immateriality of the question whether or not the claim for damages for the death of a person is a part of the estate of the deceased.

With this meaning of the treaty fixed then, as discussed in Point One, it becomes entirely immaterial as to whether the right to damages suffered by the widow and minor children by reason of the death of said Stephen Mistschook was a part of his estate in which they might be legally entitled to participate regardless of a contrary will or not, or whether their right to damages belonged directly to them as compensation for their loss arising from the death of said Stephen Mistschook. In either case their Government, the Russian Government, with the consent of the United States, in a treaty which is, in the United States, the supreme law of the land, had agreed that they should be represented by the Russian Consul.

POINT FOUR.

Since the 27th Article of the Spanish Treaty constituted the Consul the representative of the absent widow and next of kin, as much as a judicial appointment of an administrator or guardian, his action could not be avoided except for cause, such as proof of fraud.

By the supreme law of this land then, the New York courts were bound to recognize the Russian Consul as the representative of his absent compatriots—the widow and children. The Russian Consul was thereby legally constituted their agent. His receipt, Exhibit I, was proof of the settlement. His release, made in the name of the widow, Irene Mistschook, Exhibit J, bound not only her, but the children, who were all minors. They could not impugn the action of their agent, the Consul, so long as he acted without fraud and within the scope of his authority. The official acts of a Consul are *ipso facto* presumed to be within his authority from his home Government. In *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S., 319, 327, Mr. Justice McReynolds said :

> " It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law ' presumes that every man, in his private and official character, does his duty until the contrary is proved ; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the

maxim, *omnia presumuntur rite et solemniter esse acta, donnec probetur contrarium.*' "

Bank of the United States v.Dandridge, 12 Wheat., 64, 69, 70.

Knox County v. Ninth National Bank, 147 U. S., 91, 97.

Maricopa & Phoenix R. R. v. Arizona, 156 U. S. 347, 351.

Sun Publishing Assn. v. Moore, 183 U. S., 642, 649.

There was, of course, no fraud or attempted proof thereof. The only evidence was that Irene Mistschook refused to accept the $400 tendered her by the Russian Government. But she could not disown the action of her authorized agent, the Consul. Nor would it be fair for her to have an election, to be exercised after verdict, as between the settlement of the Consul and the uncertain outcome of the administrator's suit. The action of the Consul is presumed to have been for the interest of the absent aliens, and the American authorities are not concerned in the propriety of his conduct, and they will have performed their full function in giving effect to his actions.

POINT FIVE.

The Russian Consul's settlement was also authorized by the second paragraph of the 27th Article of the Spanish Treaty.

Even if it were to be held that the treaty's grant of power to the Counsel to represent the absent, unknown or minor heirs did not authorize the action of the Russian Consul in this case, yet the treaty would still furnish authorization for his act by the second paragraph of its 27th Article—providing that until the appearance of the heirs the Consul may do, so far as

compatible with local laws, all things authorized by his home Government "for the safeguarding of the property and the settlement of the estate of their deceased countrymen",—because while it is true that the damages for death technically do not belong to the estate, still they are undoubtedly within the scope of the meaning of the language. Surely the framers of the treaty meant to protect the deceased as to all rights that accrued from his death to those for whom he cared and whom he might be bound, while living, to support—his wife and minor children. A thing may be within the meaning of a law though not within its literal language for the intention of the lawmaker governs. *Hawaii v. Mankichi*, 190 U. S., 197, 212, *et seq.*

POINT SIX.

The judgment should be reversed.

STETSON, JENNINGS & RUSSELL,
Attorneys for Plaintiff-in-Error,
15 Broad Street,
Borough of Manhattan,
New York City.

FREDERIC B. JENNINGS,
WILLIAM C. CANNON,
Of counsel.

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CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
against (*Defendant below*),

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of STEPHEN MISTSCHOOK, Deceased,
Defendant-in-Error,
(*Plaintiff below*).

Supplemental Brief for the Erie Railroad Company, Plaintiff-in-Error.

FREDERIC B. JENNINGS,
WILLIAM C. CANNON,
For Plaintiff-in-Error.

C. G. BURGOYNE PRINTING BUSINESS, 72-78 Spring St., New York.

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
(Defendant below),

AGAINST

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Deceased,
Defendant-in-Error,
(Plaintiff below).

SUPPLEMENTAL BRIEF FOR ERIE RAILROAD COMPANY.

The purpose of this supplemental brief is to present a point urged in the New York State courts in this action, but omitted from the main brief filed upon the present appeal.

SUPPLEMENTAL POINT.

The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in holding that Defendant's Exhibit K for Identification and Defendant's Exhibit L for Identification were not admissible in evidence.

Plaintiff-in-Error, by its amended answer, pleaded a settlement, release, accord and satisfaction of the claim upon which this action was brought (Transcript of Record, pp. 6, 7). The release was given by the Russian Consul, at New York, in whose jurisdiction the deceased resided and where his death took place (Transcript of Record, p. 109), on behalf of the widow and next of kin of the deceased (Transcript of Record, pp. 109, 110, 193, 194). The issue was raised upon the trial whether or not the widow of the deceased accepted and ratified the action of the Russian Consul on her behalf (Transcript of Record, pp. 16, 17, 176, 177). Upon this issue the Plaintiff-in-Error offered in evidence a copy in Russian and a translation of a receipt of the widow for 770 rubles and 80 kopeks "sent" to her "as compensation" for the death of the deceased, and a copy in Russian and translation of a communication from the Governor of Volhynia, Chamberlain of the Court of the Imperial Majesty of Russia, acknowledging the receipt of the 770 rubles and 80 kopeks sent by the Russian Consulate General at New York, and forwarding the above mentioned receipt of the widow therefor to the said Consulate. These documents were rejected over the exception of the Plaintiff-in-Error (Transcript of Record, pp. 176, 177, Exhibits K and L for Identification, pp. 195, 196).

It appears from the testimony of Irene Mistschook, the widow, that 770.80 rubles, Russian money, had been deposited by the Justice of the Peace of Luck in the Imperial

Savings Bank at Luck to the credit of the heirs of the deceased. It was deposited in March, 1910, having been sent to the Governor of Volhynia and by him sent to the Justice of the Peace at Luck (Transcript of Record, pp. 16, 17). The widow of the deceased resided in the said Province of Volhynia (Transcript of Record, p. 13). She testified that she refused to accept this money (Transcript of Record, p. 17). In this state of the evidence the Plaintiff-in-Error was entitled to contradict this testimony as well as to show that the money which had been paid to the Russian Consulate at New York City in settlement of the claim for the death of the deceased had been paid to and accepted by her, and was, at least as to the widow, an accord and satisfaction of her claim, and a ratification of the action of the Russian Consul, binding upon her even though the settlement and release of the Russian Consul would otherwise have been ineffective. It will be observed that the receipt, Exhibit K, was signed by the widow, through an officer of the Trostianzy Volost, and the translation of the Russian document was certified to be correct by and under the seal of the Imperial Russian Consulate General at New York. The communication from the Governor of Volhynia, forwarding the receipt, was similarly authenticated (Exhibit L).

These documents were rejected, not as being immaterial, but apparently on the ground that the widow did not sign the receipt in person and that the documents were not properly proved (Transcript of Record, p. 177). The Court of Appeals of the State of New York held that there was no meritorious exception on the part of Plaintiff-in-Error to the rulings of the trial justice in rejecting evidence (Transcript of Record, p. 225). The propriety of the ruling now in question is presented to this Court under the fourteenth assignment of error (Transcript of Record, p. 212).

The documents in question were competent proof and should have been admitted under the provisions of various

treaties, applicable by reason of the " most favored nation " clause in the treaty with Russia.

Treaty with Belgium, 1880, Art. X., 1 Malloy, 97.

Treaty with France, 1853, Art. VI., 1 Malloy, 530–531.

Treaty with Greece, 1902, Art. X., 1 Malloy, 858.

Treaty with Italy, 1878, Art. X., 1 Malloy, 980.

Treaty with Germany, 1871, Art. IX., 1 Malloy, 552–553.

The treaty with Germany provides as follows :

" Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two countries, or their Chancellors, shall have the right, conformably to the laws and regulations of their country, * * *

" 2. To receive and verify unilateral acts, wills and bequests of their countrymen, and any and all acts of agreement entered upon between citizens of their own country * * * and the citizens or other inhabitants of the country where they reside ; * * *

" All such acts of agreement and other instruments, and also copies and translations thereof, when duly authenticated by such Consul-General, Consul, Vice-Consul or Consular Agent, under his official seal, shall be received by public officials and in courts of justice as legal documents, or as authenticated copies, as the case may be, and shall have the same force and effect as if drawn up or authenticated by competent public officers of one or the other of the two countries."

Under the provisions referred to, and particularly under those quoted, it would seem clear that Exhibits K and L for Identification were erroneously excluded. Even if it be held that the Russian Consul exceeded his authority in presuming to settle the claim on behalf of the widow and others, it is nevertheless true that the amount of the settlement was tendered to the widow through the Russian Consul, and her act by way of acceptance thereof, " as compensation " for the death of the deceased (as appears from the excluded evidence), was an " act of agreement," and

if it should be deemed not a technical agreement, it was at the very least a "unilateral act" within the meaning of the German treaty. The receipt is no less the act or agreement of the widow because she did not sign it in person. The receipt purports to have come through the regular channels in the regular course of the official consular business, and upon formal authentication by the Consul it is to be presumed that it was executed conformably to the laws of Russia (See Agency of Canadian Car & Foundry Co. vs. American Can Co., 253 Federal Rep., 152).

It would be mere quibbling over words to contend that the Russian Consul certified only to the correctness of the *translation* of a nondescript and unauthenticated writing in Russian. It is not the function of Consuls to act in a merely clerical capacity as translators of the Russian language. If such were the only significance of the consular certification, then the affixing of the consular seal thereto would be meaningless. It could add nothing to a correct translation nor could it give any validity to a bad translation. Obviously the certification under seal was intended, and should be construed, as a formal authentication by the Consul of the documents in question, made for the purpose of facilitating the transaction of business between his national and a citizen of New York in accordance with his duties and his rights under treaty.

The rejection of these duly authenticated documents wsa an error requiring a reversal of the judgment of the Supreme Court of the State of New York.

STETSON, JENNINGS & RUSSELL,
Attorneys for Plaintiff-in-Error,
15 Broad Street,
Borough of Manhattan,
New York City.

FREDERIC B. JENNINGS,
WILLIAM C. CANNON,
HAROLD W. BISSELL,
Of Counsel.